Supreme Court, U.S.
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No. _____

In the Supreme Court of the United States

MARCUS A. NOBLE,

Petitioner,

v.

BRINKER INTERNATIONAL, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

DENNIS M. MCGUIRE
3380 STONEMASON WAY
COLUMBUS, OH 43221
(614) 529-9117

LAREN E. KNOLL
Counsel of Record
KENNEDY REEVE & KNOLL
98 HAMILTON PARK
COLUMBUS, OH 43203
(614) 228-2050

Counsel for Petitioner

Becker Gallagher Legal Publishing, Inc. 800.890.5001

QUESTIONS PRESENTED FOR REVIEW

I. Whether there is a legally sufficient causal nexus, under Title VII of the 1964 civil Rights Act, for a reasonable jury to conclude that a former supervisor's discriminatory animus somehow influenced a termination decision when the animus was conveyed to the decisionmaker during a discussion of the "challenges" the former supervisor experienced and when a supervisor who worked for both the decisionmaker and the former supervisor informed the decisionmaker of the racial animosity the day before the plaintiff's termination.

II. Whether a plaintiff alleging race discrimination under Title VII of the 1964 Civil Rights Act may establish the fourth prong of the *prima facie* case under the *McDonnell Douglas* framework by relying on circumstantial evidence that tends to raise an inference of discrimination.

III. Whether *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000), prevents a court in ruling on a Rule 50 motion for judgment as a matter of law from substituting its judgment for a jury by weighing the evidence, making credibility determinations, and drawing inferences in favor of the moving party.

PARTIES TO PROCEEDING

The petitioner is Marcus Noble. The respondent is Brinker International, Inc.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Marcus Noble respectfully petitions for a writ of *certiorari* to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is published at 391 F.3d 715 (6th Cir. 2004) (App. 3a-17a). Petition for rehearing, *en banc*, was denied, and is published at 2005 U.S. App. LEXIS 4655 (6th Cir. 2005) (App. 1a). The opinion of the district court is published at 175 F. Supp. 2d 1027 (S.D. Ohio 2001) (App. 43a).

JURISDICTION

The judgment of United States Court of Appeals for the Sixth Circuit (App. 3a) was entered on December 3, 2004, and its order denying rehearing was entered on March 4, 2005 (App. 1a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS AND RULES

42 U.S.C. 2000e-2(a)(1), 42 U.S.C. § 1981, Ohio Revised Code 4112.02, and Rule 50(a)(1) of the Federal Rules of Civil Procedure are reproduced at App. 73a.

STATEMENT OF THE CASE

This petition seeks review of a decision of the United States Court of Appeals for the Sixth Circuit which reversed a decision of the United States District Court for the Southern District of Ohio denying Respondent's Motion for Judgment as a Matter of Law.

After a trial on the merits and unanimous jury verdict, a panel majority reversed the District Court's denial of

Respondent's motion for judgment as a matter of law. The majority concluded the following: 1) that Petitioner produced evidence of racial animus by manager Linda Lawrence; 2) that Petitioner demonstrated that manager Anthony Ficorilli had knowledge of that animosity; 3) that Petitioner demonstrated that Respondent's proffered legitimate business reason (*i.e.*, that Petitioner violated the no call/no show policy) for terminating Petitioner was false; 4) that there were no similarly situated employees who had been retained by Ficorilli upon an alleged violation of the no call/no show policy.

In an extensive opinion, the majority based its ruling on two primary considerations: 1) that Petitioner failed to establish a causal nexus between Lawrence, the manager that demonstrated racial animosity, and Ficorilli, the decisionmaker who terminated Petitioner; and 2) that Petitioner failed to establish a *prima facie* case because he failed to establish that he was treated differently than similarly situated people outside the protected class.

In reaching its decision, the panel majority disregarded important Supreme Court precedent, including *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133 (2000) and *U.S.P.S. Bd. of Governors v. Aikens*, 460 U.S. 711 (1983). The decision highlights a conflict among the circuits on two important issues: 1) the standard for establishing a causal nexus when a non-decisionmaker who harbors racial animosity somehow influences the decionmaker to take an adverse employment action against a member of a protected class; and 2) whether a court may revisit the *prima facie* case after a full trial on the merits and jury verdict. The panel majority replaced its judgment for that of the jury. Despite *Reeves*, some courts continue to exploit loopholes in order to reverse jury verdicts in employment discrimination cases.

A. Factual Background

Petitioner, Marcus Noble, is an African-American, who worked as a server at Romano's Macaroni Grill from June 1998, until his termination on April 18, 1999. Respondent, Brinker International, Inc., operates Macaroni Grill restaurants. Petitioner initially reported to general manager Linda Lawrence; Jeanne Osborne and Tim Wiseman were also members of the managerial staff.

Immediately upon beginning work, Petitioner experienced discriminatory treatment from Lawrence, including the following: (1) before Petitioner could begin serving and earning tips, Lawrence, on at least eight occasions, forced him and another African American employee to repeat a one hour-and-twenty-minute oral examination about the restaurant's menu because Lawrence kept failing him (Petitioner passed the oral exam when he arranged for Osborne to administer the exam, which took about fifteen to twenty minutes); (2) Lawrence prevented the hostesses from seating guests at Petitioner's tables; (3) Lawrence harassed Petitioner about not providing his correct social security number on his employment application and for failing to indicate that he was working at Chili's, another restaurant operated by Respondent (Petitioner previously had advised an assistant manager of his employment at Chili's and explained that the incorrect social security number, which contained one incorrect number, was an inadvertent mistake); and (4) Lawrence suspended Petitioner for two weeks after she gave him three separate disciplinary write-ups on a single night for incidents that allegedly were precipitated by customer complaints about his service.

Petitioner denied the occurrence of all three of the infractions that precipitated the two week suspension. When he complained to Wiseman that Lawrence was discriminating

against him, Wiseman made a note in the manager's log, stating, "[Petitioner] came in yesterday to let us know he filed suit against us for racial discrimination. I gave him corporate general phone number and told him he's free to do whatever he wants." Directly underneath Wiseman's notation, it stated, "1-800 J Springer."[1]

Petitioner offered other evidence that demonstrated Lawrence's racial animosity toward Petitioner and other black employees. Wayne Crutcher was an African American who worked as a server at Macaroni Grill under Lawrence until she terminated him. Crutcher testified that at a manager's meeting between Lawrence and two chefs, he heard Lawrence and the chefs laughing about black people and stating that black people "might not know much." Hamady Sall, an African dishwasher who worked for Lawrence until she terminated him, testified that Lawrence made him shovel the snow and sweep the sidewalk, even though neither were part of his duties. Lawrence also limited the areas in which he could take a smoke break, limited his ability to switch shifts, denied him free lunches, and denied his overtime pay, but white employees received free lunches and were not limited as to where they could smoke.

In January 1999, Lawrence transferred to another location, and Anthony Ficorilli replaced her as general manager. After Lawrence relocated, she and Ficorilli met on at least one occasion to discuss the "challenges" associated with operating the store. At trial, Lawrence and Ficorilli denied discussing Petitioner, but Lawrence admitted that

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[1] Jerry Springer hosts a daytime talk television show. The show has come to represent the ultimate distillation of "trash talk" show television. The show involves sensational sex gossip, confrontation, violent outbreaks, weeping, and public shame and humiliation.

Petitioner could be classified as one of her "challenges" at the Worthington Macaroni Grill.

In April of 1999, Petitioner was terminated for allegedly missing a shift that he verbally agreed to work on April 17, 1999, and failed to call. Petitioner did not violate the no call/no show policy. First, Petitioner denied that he agreed to pick up the April 17, 1999 shift. On or about April 16, 1999, Petitioner provided Wiseman with a medical excuse from work for April 14 to April 19, 1999. Second, there was no documentation demonstrating that Noble agreed to pick up the April 17th shift, despite three separate systems for documenting changes or additions to shifts: the manager's "Red Book," a "shift pickup book," and a computerized schedule.

On the day that Petitioner allegedly committed the no call/no show, Wiseman informed Ficorilli of the contentious relationship between Lawrence and Petitioner and that Petitioner threatened legal action as a result of discrimination that he faced. On April 18, 1999, the very next day, Ficorilli instructed the assistant manager to terminate Petitioner, pursuant to the Respondent's policy that an employee who violates the "no call/no show policy" may be terminated.

Osborne testified that without documentation of a change in shift, termination would be inappropriate because a manager had no evidence that the employee agreed to pick up a shift. Although Ficorilli testified that he strictly enforced the no call/no show policy, Wiseman testified that, in his experience, an employee would not be terminated for a first offense violation of the no call/no show policy. Ficorilli admitted that Petitioner's alleged no call/no show on April 17th would have been his first offense. Although Ficorilli testified that he strictly enforced the no call/no show policy, Petitioner offered two examples where employees did not

show up or call off for a shift and were not immediately terminated.

First, Respondent offered Michael Brahler as a similarly situated person outside of the protected class who was treated more favorably than Petitioner. Brahler testified that he worked at the same location as Petitioner, in the same position, and under the same manager. On one occasion, Brahler's vehicle broke down, and he called Macaroni Grill and explained the situation. The manager told him not to come in because it was slow, but he was required to show proof that he did, in fact, have vehicle problems. In the case of Petitioner, once he realized that Ficorilli believed he violated the no call/no show policy, Petitioner provided John Clark, the manager that terminated Petitioner on the orders of Ficorilli, with the medical excuse again. Brahler testified that his understanding of the no call/no show policy was that if an employee produced justifiable reasons for not appearing for his shift, then termination would not be warranted. On another occasion, Brahler testified that he gave two weeks notice that he would be leaving Macaroni Grill, was scheduled to work within that two week notice time period, and failed to appear for any of his shifts.

Second, Petitioner offered the example of an unidentified employee named "Will" to impeach Ficorilli's testimony that he strictly enforced the no call/no show policy. There was a notation in the manager's Red Book, stating, "Will is no longer working for us. He has not showed [sic] for a shift in over a week." It was only after Will failed to show for an entire week that Ficorilli terminated him.

B. **Procedural History**

Petitioner filed suit alleging violations of 42 U.S.C. § 2000e-2(a)(1), 42 U.S.C. § 1981, Ohio Revised Code § 4112.02, and Ohio public policy. Respondent filed a

motion for summary judgment as to all counts. After careful review, the district court denied Respondent's motion on all counts, except as to Petitioner's common law public policy claim.

The case proceeded to trial, but the jury was unable to reach a unanimous verdict. Thus, the district court dismissed the jury. The case proceeded to a second trial. Respondent moved for judgment as a matter of law at the end of Petitioner's case-in-chief, at the end of its case, and at the close of all evidence. The district court denied the motions, and the case went to the jury. The jury unanimously determined that Respondent intentionally discriminated against Petitioner because of his race and awarded Petitioner $25,000 in actual damages and $228,125 in punitive damages. Respondent filed a renewed motion for judgment as a matter of law or, in the alternative, for a new trial. The district court denied the motion, and Respondent appealed to the United States Court of Appeals for the Sixth Circuit.

The Sixth Circuit Court of Appeals majority (Ryan and Daughtrey, JJ.) reversed the district court's decision denying Respondent's motion for judgment as a matter of law. The majority held that there was no legally sufficient evidentiary basis for a reasonable jury to find that Petitioner was discharged because of his race.

First, the majority held that "a reasonable jury could not have inferred racial discrimination on the part of Ficorilli based upon the alleged discriminatory prior acts of Lawrence." (App. 15a). The majority acknowledged that the "evidence showed that Ficorilli may have learned of prior problems between Lawrence and [Petitioner] after Lawrence left[,]" but that Ficorilli's "mere knowledge of the conflict between [Petitioner] and Lawrence is insufficient as a matter of law to establish a causal nexus between Lawrence's alleged

racial animosity toward [Petitioner] and Ficorilli's actions." (App. 15a).

Second, the majority found that Petitioner failed to establish a *prima facie* case at trial because he failed to identify a similarly situated employee outside the protected class who was treated more favorably than he. First, the majority determined that Michael Brahler was not similarly situated to Petitioner because Brahler turned in his end of employment notice at the time he had the no call/no shows.

Next, the majority determined that the evidence related to an unidentified employee named Will was irrelevant because the limited information about the employee did not permit the majority to determine whether Will was outside the protected class or whether he was treated more favorably than Petitioner.

Judge Clay vociferously dissented, stating that "there is absolutely no basis for the majority to hold that Brinker is entitled to judgment as a matter of law," and the majority's decision was "flatly wrong." (App. 38a). Judge Clay began his dissent by stating,

> The majority acknowledges that the jury reasonably could have found that [Petitioner's] former restaurant manager, Linda Lawrence, discriminated against him because of his race. The majority further acknowledges that [Petitioner] submitted evidence showing that [Petitioner's] complaints about Lawrence's discriminatory treatment were conveyed to manager Anthony Ficorilli at the time Ficorilli decided to terminate Noble for purportedly failing to show up for a shift on April 17, 1999. The majority further acknowledges that the jury reasonably could have found that Ficorilli fabricated his reason for terminating [Petitioner] because [Petitioner] never

> agreed to work the April 17, 1999 shift. Nevertheless, the majority holds that no reasonable jury could have found that Ficorilli acted upon Lawrence's racial animus when he terminated [Petitioner] for a contrived reason. Instead, *the majority substitutes its own inferences from the facts to eviscerate the jury's verdict for Noble*. Because *the majority has usurped the jury's role as the ultimate finder of fact*, I respectfully dissent.

(App. 31a) (emphasis added).

The dissent addressed the issue whether a similarly situated person outside of the protected class was treated more favorably than Petitioner. Judge Clay stated that the "real issue" was not whether Petitioner was terminated after one alleged no call/no show, while Brahler was not immediately terminated after his first no call/no show. According to the dissent, "the real issue is whether Ficorilli should have applied the no call/no show policy to [Petitioner] in the first place." (App. 37a). Judge Clay reasoned that the jury reasonably could have disbelieved Ficorilli's assertion that Petitioner violated the policy; and, therefore, "the jury reasonably could have found that Ficorilli's 'equal' treatment of Noble and Brahler...was not equal because [Petitioner] never should have been subjected to that policy" because he never violated it. (*Id.*).

Judge Clay stated that the "proper comparison" would show that "Ficorilli terminated Brahler for violating the no call/no show policy after Brahler actually violated that policy, [but] Ficorilli terminated [Petitioner] for violating that policy even though Ficorilli knew (or so the jury could have found) that [Petitioner] had not violated it." (*Id.*). The dissent argued that viewed in the proper manner, Ficorilli's actions were "the quintessence of disparate treatment and certainly

was sufficient to demonstrate the fourth element of [Petitioner's] minimal burden to produce sufficient evidence demonstrating his *prima facie* case." (*Id.*).

Judge Clay noted that Petitioner satisfied the fourth element of the *prima facie* case by presenting other circumstantial evidence that raised an inference of discrimination. The dissent examined Petitioner's evidence linking Lawrence and Ficorilli and noted, "[C]ontemporaneous with Noble's alleged no call/no show on April 17, 1999, Ficorilli was apprised that Noble had complained about race discrimination by his former manager and that he was prepared to take legal action. The very next day, Ficorilli terminated Noble." (*Id.* at 39a). The dissent recognized that a reasonable inference from the evidence was that Lawrence's racial animus influenced Ficorilli's decision to terminate Petitioner.

On December 17, 2004, Petitioner filed a Petition for Rehearing *En Banc*. The order denying the Rehearing was issued on March 4, 2005. (App. 1a).

REASONS WHY THE WRIT SHOULD BE GRANTED

I. There is an Express Conflict in the Circuits on the Level of Evidence Necessary to Establish a Causal Nexus Between the Decisionmaker and the Person with Racial Animus.

This case highlights a mature and exceedingly important inter-circuit conflict that calls into question the very viability of federal employment discrimination statutes. In a fact scenario that is increasingly common in disparate treatment cases, a person other than the ultimate decisionmaker who has bias against a class of people somehow influences the decision of the ultimate decisionmaker to terminate or otherwise discipline an employee who is a member of the protected class. The issue is, how may the biases of the non-

decisionmaker be imputed to the ultimate decisionmaker. The Court should grant *certiorari* on two important points: first, to establish the standard to be used to establish a causal nexus; and, second, to determine the quantum of circumstantial evidence necessary to establish a causal nexus under the standard adopted by the Court.

In the distinct minority on this issue is the Fourth Circuit. In an *en banc* Fourth Circuit decision, *Hill v. Lockheed Martin Logistics Management, Inc.*, 354 F.3d 277 (4th Cir. 2004), the individual to whom racial animus had been attributed was a safety inspector, a subordinate with no managerial authority over the plaintiff. After holding that an employer cannot insulate itself from liability by merely rubber-stamping the biased employee's determination, the court held nonetheless:

> [W]e decline to endorse a construction of the discrimination statutes that would allow a biased subordinate who has no supervisory or disciplinary authority and who does not make the final or formal employment decision to become a decisionmaker simply because he had a substantial influence on the ultimate decision or because he has played a role, even a significant one, in the adverse employment decision.

Id. at 291. The safety inspector allegedly singled the plaintiff out for violations because of race. These reports ultimately played a role in the plaintiff's termination, but the court refused to consider this level of involvement enough to trigger application of the discrimination statutes. *Id.* at 291-92. Specifically, the court held that to survive a motion for summary judgment, "an aggrieved employee who rests a discrimination claim upon the discriminatory motivations of a subordinate employee must come forward with sufficient

evidence that the subordinate employee *possessed such authority as to be viewed as the one principally responsible for the decision* or the actual decisionmaker for the employer." *Id.* at 291 (emphasis added). In support of this standard, the Fourth Circuit relied substantially on Seventh Circuit authority. *Id.* at 290; *see, e.g., Schreiner v. Caterpillar, Inc.*, 250 F.3d 1096, 1100 (7th Cir.2001) (must be a "factual basis in the record for the assertion that the biased individual's prejudice was *the motivation* for the decision-maker's actions") (emphasis added).

Hill is at odds with circuit authority elsewhere. *See, e.g., Hill*, 354 F.3d at 303 (Michael, J., dissenting) (citing cases from different circuits in opposition). The First Circuit holds that a plaintiff can demonstrate the existence of unlawful discrimination through evidence of bias on the part of "those in a position to influence the decisionmaker." *Santiago-Ramos v. Centennial P.R. Wireless Corp.*, 217 F. 3d 46, 55 (1st Cir. 2000). In *Santiago-Ramos*, the actual decisionmaker, a company vice-president in New Jersey, dismissed the plaintiff after obtaining information and advice about whether to fire her from the plaintiff's immediate supervisor in Puerto Rico. The First Circuit concluded that a reasonable jury could rely on evidence of bias by that supervisor in determining that unlawful discrimination had occurred. *Id.* at 55.

In *Mulero-Rodriguez v. Ponte, Inc.*, 98 F. 3d 670, 676 (1st Cir. 1996), the court held that liability may be established through evidence of bias on the part of an official "in a position to influence" the decision. In *Mulero-Rodriguez*, the actual decisionmaker who fired the plaintiff was the owner of the company; the court concluded that a reasonable jury could find the plaintiff's dismissal unlawful because that decisionmaker had obtained critical information about the

plaintiff from an allegedly biased company accountant. *Id.* at 676.

In *Ostrowski v. Atlantic Mutual Insurance Co.*, 968 F. 2d 171, 182 (2d Cir. 1992), the Second Circuit held that a jury could base a finding of unlawful discrimination on evidence of discriminatory motives on the part of "a person involved in the decisionmaking process." The company vice-president who made the decision to fire Ostrowski insisted that he had conducted his "own independent review" of the plaintiff's performance; but, the decisionmaker acknowledged that his information about that performance record had come from the particular supervisor who had made a series of remarks reflecting animus toward older employees. *Id.* at 175.

Similarly, in the Third Circuit in order to establish unlawful discrimination "it is sufficient if those exhibiting discriminatory animus influenced or participated in the decision to terminate." *Abramson v. William Paterson College of New Jersey*, 260 F. 3d 265, 286 (3d Cir. 2001). In *Abramson*, the decision to deny tenure to the plaintiff had unquestionably been made by the college president. However, although the relevant faculty committee had voted in favor of tenure, a dean had recommended against tenure. The court of appeals concluded there was sufficient evidence to support a jury verdict in favor of the plaintiff's religious discrimination claim because there was evidence that the dean and a department chair were anti-Semitic and had played a role in the tenure decision. The court concluded that the college president "did not make his decision in a vacuum. A reasonable inference could be drawn that [the president] was influenced by both [the dean and the chair]." *Id.* at 285.

On five different occasions the Fifth Circuit endorsed and applied the rule rejected by the *Hill* court, holding that a finding of liability can be based on evidence that a biased

official influenced the actual decisionmaker. In *Laxton v. Gap Inc.*, 333 F. 3d 572 (5th Cir. 2003), the Fifth Circuit upheld a jury verdict on the basis of such evidence. Laxton alleged that she had been fired because she was pregnant, and offered evidence that her immediate supervisor had objected to the pregnancy. The court of appeals upheld the verdict despite the fact that the decision to fire Laxton had been made by two other officials at the company's corporate headquarters. Evidence of discriminatory remarks, it explained, was sufficient to support such a jury verdict if the remarks were made "by a person primarily responsible for the adverse employment action or by a person with influence or leverage over the formal decisionmaker." *Id.* at 572. The corporate officials were primarily responsible for the dismissal, but one of them acknowledged that the allegedly biased supervisor "served as her primary source of information." *Id.* at 584; *see, also, Palasota v. Haggar Clothing Co.*, 342 F. 3d 568, 578 (5th Cir. 2003); *Gee v. Principi*, 289 F. 3d 342, 345-47 (5th Cir. 2002); *Rios v. Rossotti*, 252 F. 3d 375, 381 (5th Cir. 2001); *Russell v. McKinney Hospital Venture*, 235 F. 3d 219, 227 (5th Cir. 2000).

In *Ercegovich v. Goodyear Tire & Rubber Co.*, 154 F. 3d 344, 354-55 (6th Cir. 1998), the Sixth Circuit reiterated that a finding of discrimination could be based on "remarks by those who did not independently have the authority or did not directly exercise their authority to fire the plaintiff, but who nevertheless played a meaningful role in the decision to terminate the plaintiff [.]" The critical question was whether the individual who made the biased remarks "was in a *position to influence* the...decision" made by the ultimate decisionmaker. *Id.* at 355 (emphasis added).

Also, in *Simpson v. Diversitech*, 945 F. 2d 156 (6th Cir. 1991), the trial court found that a low level supervisor had for

racial reasons initiated certain disciplinary actions against the plaintiff, but that that supervisor "had no role in the final decision" by higher ranking officials to fire the plaintiff. *Id.* at 160. The Sixth Circuit held that, on those facts, the plaintiff was entitled to judgment as a matter of law, because the supervisor had caused the resulting dismissal. "[A]bsent [the supervisor's] race-based motive . . . there would not have been a [dismissal]." *Id.* at 160; *see, also, Wilson v. Stroh Cos., Inc.*, 952 F.2d 942, 946 (6th Cir. 1992) (affirming summary judgment for employer because the plaintiff failed to submit evidence that his supervisor's racial animus had "somehow influenced" or affected the decision of two other managers to terminate him; the managers' decision was based on an independent investigation of the plaintiff's conduct).

The majority in *Hill* rested its decision heavily on the Seventh Circuit decision in *Shager v. Upjohn Co.*, 913 F. 2d 398 (1990), because *Shager* was cited by this Court in *Burlington Industries v. Ellerth*, 524 U.S. 742 (1998). But the Seventh Circuit itself does not construe *Shager* as limiting liability to intentional discrimination by the formal decisionmakers or, in rare instances, by officials who exercise complete control over titular decisionmakers. The Seventh Circuit has repeatedly found an employer liable where its decisions were affected by the actions of a lower level official who, for discriminatory reasons, provided false or incomplete information to the actual decisionmaker. *See, David v. Caterpillar, Inc.*, 324 F.3d 851, 861 (7th Cir. 2003); *Willis v. Marion Cty Auditor's Office*, 118 F.3d 542, 547 (7th Cir. 1997); *Wallace v. SMC Pneumatics, Inc.*, 103 F.3d 1394, 1400 (7th Cir. 1997); *Gusman v. Unisys Corp.*, 986 F.2d 1146, 1147 (7th Cir. 1993).

Even a recommendation of dismissal from a biased subordinate official can fatally taint the decision of the actual decisionmaker. In *Dey v. Colt Construction & Development*

Co., 28 F. 3d 1446 (7th Cir. 1994), the plaintiff alleged that she had been fired in retaliation for complaining about sexual harassment. The company president who dismissed Dey insisted he was unaware of the complaints and that "the final decision was his alone." *Id.* at 1459. But prior to making his decision, the company president had solicited the views of the harassing official, who commented on the unsatisfactory nature of Dey's performance and recommended that she be replaced. The court concluded that "[s]ummary judgment generally is improper where the plaintiff can show that an employee with discriminatory animus provided...input that may have affected the adverse employment action." *Id.* at 1459 (*citing Shager*, 913 F.2d 398). The Seventh Circuit has rejected reliance on biases of an official other than the actual decisionmaker only where there was no evidence that the biased official had any influence on the decisionmaking process. *See, e.g., Eiland v. Trinity Hospital*, 150 F. 3d 747, 752 (7th Cir. 1998); *and, Bahl v. Royal Indemnity Co.*, 115 F. 3d 1283, 1293 (7th Cir. 1997).

The Eight and Ninth Circuits have also rejected the standard adopted by the Fourth Circuit in *Hill*. *See, e.g., Stacks v. Southwestern Bell Yellow Pages, Inc.*, 27 F.3d 1316, 1323 (8th Cir. 1994) (internal quotation marks omitted) (discriminatory remarks of a manager, who was the fired plaintiff's supervisor and who was "closely involved in employment decisions," constitute direct evidence of discrimination); *Bergene v. Salt River Project Agric. Improvement & Power Dist.*, 272 F.3d 1136, 1141 (9th Cir. 2001) (manager's comment was direct evidence of retaliation because "even if [the] manager was not the ultimate decisionmaker [in denying the plaintiff a promotion], that manager's retaliatory motive may be imputed to the company if the manager was involved in the...decision").

Reeves supports the approach of imputing to the employer the biased motives of another person who influences an employment decision, rather than the harsh rule as set forth in *Hill*. In *Reeves*, this Court focused on the importance of causation in employment discrimination cases: "liability depends on whether the protected trait (under the ADEA, age)...actually played a role in [the employer's decisionmaking] process and had a determinative influence on the [adverse decision]." 530 U.S. at 141 (quotation marks and citations omitted). *Reeves* assumes that the formal employment decision will be made by someone in authority. What matters for liability purposes is whether bias against a protected trait, including bias from another person, had a determinative influence on the decision. *See id.*

In the case at bar, there is no question that there was sufficient evidence for the jury to conclude that Lawrence's discriminatory animus had a determinative influence on Ficorilli's termination decision. The majority conceded that Lawrence demonstrated racial animosity toward Petitioner. A reasonable jury could disbelieve that Lawrence and Ficorilli never discussed Petitioner when they spoke of the "challenges" that Lawrence faced as the manager of the Worthington Macaroni Grill. A reasonable jury could have believed that Wiseman told Ficorilli about Lawrence's racial animosity, as well as Petitioner's allegations of racial discrimination, the day before Ficorilli terminated Petitioner. The majority conceded that Ficorilli's proffered reason for terminating Petitioner, the alleged no call/no show, was reasonably determined by the jury to be false. Respondent offered no other reason for the termination.

Petitioner offered evidence that he had a medical excuse for the day of the alleged no call/no show that he gave to Wiseman before his termination. He presented the medical excuse again when he returned to work and was notified he

was being terminated for a no call/no show. When Petitioner allegedly missed this shift, Wiseman knew of Petitioner's medical excuse. However, rather than discuss Petitioner's excuse, Wiseman chose to tell Ficorilli about the racial animosity between Lawrence and Petitioner. It was reasonable for the jury to infer intentional discrimination given all the circumstantial evidence. A reasonable jury could have found that Ficorilli not only acted as a conduit for Lawrence's and Wiseman's discriminatory animus, but also knowingly based his termination decision on that animus.

The Supreme Court should grant *certiorari* to articulate the standard to be used to establish a causal nexus; and, second, to determine the quantum of circumstantial evidence necessary to establish a causal nexus under the standard adopted by the Court.

II. There is a Split Among the Circuits as to Whether a Court May Revisit the *Prima Facie* Case After a Trial on the Merits.

In *United States Postal Service Board v. Aikens*, 460 U.S. 711 (1983), the Court held that a court may not, after a trial on the merits, grant judgment as a matter of law because the plaintiff failed to establish a *prima facie* case. The decision in *Reeves* did not overrule *Aikens*. In *Reeves*, the Court explained that

> whether judgment as a matter of law is appropriate in any particular case will depend on a number of factors. Those include the strength of the plaintiff's *prima facie* case, the probative value of the proof that the employer's explanation is false, and any other evidence that properly may be considered on a motion for judgment as a matter of law.

Reeves, 120 S.Ct. at 2108. Thus, the *prima facie* case is merely one factor to consider when determining whether the plaintiff proved discrimination *vel non*.

In *Kovacevich v. Kent State Univ.*, 224 F.3d 806 (6th Cir. 2000), the Sixth Circuit properly applied *Aikens* and *Reeves*. The district court granted KSU judgment as a matter of law on several claims because Kovacevich did not satisfy the *prima facie* case. The Sixth Circuit reversed that portion of the decision. The court stated that the district court's decision "contravened circuit caselaw[,]" specifically, *EEOC v. Avery Dennison Corp.*, 104 F.3d 858 (6th Cir. 1997). Relying heavily on *Aikens*, *Avery Denison* held the following: "Following a trial on the merits, the district court, therefore, cannot return to a consideration of whether plaintiff has proven its *prima facie* case. This is a preliminary matter which cannot be revisited at a later time." 104 F.3d at 821.

The majority below declared that it was in line with *Aikens*, *Reeves*, and *Avery Denison* because it was merely "considering evidence that also bears on the *prima facie* case...in order to address the ultimate question of discrimination." (App. 21a). However, after it asserts its compliance with *Aikens* and *Reeves*, the court boldly declared that Petitioner's "fail[ure] to produce evidence at trial to support a *prima facie* case of discrimination is significant because it takes [Petitioner] outside the scope of the rule applied in *Reeves*" (*Id.* at 29a); namely, the rule that "plaintiff's *prima facie* case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated." *Reeves*, 530 U.S. at 138. The court below concluded that *Reeves* was "inapplicable to the facts of this case because [Petitioner] failed to present evidence to support a *prima facie* case." (App. 29a).

Courts in the Sixth Circuit have routinely used the alleged absence of a *prima facie* case to reverse jury verdicts. *See*, *Moore v. City of Columbus*, 2005 U.S. App. LEXIS 7970 (6th Cir. May 6, 2005); *Noble*, 391 F.3d 715; *Gatch v. Milacron, Inc.*, 2004 U.S. App. LEXIS 19105 (6th Cir. August 31, 2004); *Johnson v. UPS*, 2004 U.S. App. LEXIS 27209, (6th Cir. December 21, 2004); *Roh v. Lakeshore Estates, Inc.*, 241 F.3d 491 (6th Cir. 2001); *Gray v. Toshiba Am. Consumer Prods.*, 263 F.3d 595 (6th Cir. 2001).

Courts in the Sixth Circuit evolved to this type of analysis, *i.e.*, finding the plaintiff failed to establish a *prima facie* case, for a very simple reason. *Reeves* was quite clear that it would be very rare that the plaintiff would *not* prevail when the plaintiff established a *prima facie* case and proved that the employer's proffered justification was false. *See Reeves*, 530 U.S. at 148. The Court explained that, under those circumstances, a plaintiff will not prevail "if the record conclusively revealed some other, nondiscriminatory reason for the employer's decision, or if the plaintiff created only a weak issue of fact as to whether the employer's reason was untrue and there was abundant and uncontroverted independent evidence that no discrimination had occurred." *Id.* Therefore, courts in the Sixth Circuit have done what the majority below did: revisit the *prima facie* case; determine the plaintiff failed to establish the *prima facie* case, even though the burden is not onerous; and reverse jury verdicts, in whole or in part, because the plaintiff failed to establish a *prima facie* case. By determining that the plaintiff failed to establish a *prima facie* case, a court can escape the rule in *Reeves*, which strictly limits when a jury verdict may be overturned, by stating that *Reeves* is inapplicable.

As a testament to the misapplication of *Reeves*, in four of the six decisions reversing jury verdicts after a trial, there were strong dissents. *Noble*, 391 F.3d 715; *Gatch*, 2004

U.S. App. LEXIS 19105; *Johnson*, 2004 U.S. App. LEXIS 27209; *Roh*, 241 F.3d 491. Although some panels in the Sixth Circuit are misapplying *Reeves*, others are faithfully adhering to its mandates. *See, e.g., Acree v. Tyson Bearing Co., Inc.*, 2005 U.S. App. LEXIS 2600 (6th Cir. Feb. 11, 2005); *White v. Burlington & Santa Fe Ry.*, 364 F.3d 789 (6th Cir. 2004).

Barnes v. City of Cincinnati, 401 F.3d 729 (6th Cir. 2005), is an excellent example of the correct implementation of *Reeves*. In *Barnes*, the court stated,

> When reviewing the facts of a discrimination claim after there has been a full trial on the merits, we must focus on the ultimate question of discrimination rather than on whether a plaintiff made out a *prima facie* case...[T]he evidentiary underpinnings of a plaintiff's *prima facie* case are not irrelevant or insulated from our examination to aid our determination whether the evidence is sufficient to support a finding of intentional discrimination.

401 F.3d at 736 (*citing Noble*, 391 F.3d at 724-26).

The court cited *Noble* for these propositions; this is what makes *Noble* so insidious. The court in *Noble* correctly states the rules of law, but then misapplies the rules in such a manner that turns *Reeves* on its head. However, the majority in *Noble* and the panel in *Barnes* differ in one very important respect. Unlike the majority in the court below, the court in *Barnes* recognized that its duty was not to usurp the jury's role as the ultimate finder of fact:

> While we may have reached a different conclusion sitting as the finder-of-fact, it is not our role to substitute our judgment for that of the jury. Rather,

> we are left to examine whether Barnes produced sufficient evidence at trial to carry his burden of proof.

Id. at 738.

Other circuits follow the same approach laid out by the Sixth Circuit in *Barnes*. The Fifth Circuit prohibits its courts from revisiting the *prima facie* case following a trial on the merits. In *West v. Nabors Drilling USA, Inc.*, 330 F.3d 379, 385 (5th Cir. 2003) (citations omitted), the court stated, "When a case has been fully tried on the merits, we do not focus on the *McDonnell Douglas* burden-shifting scheme as such. Instead, we inquire whether the record contains sufficient evidence to support the jury's ultimate findings." The court stated that *Reeves* does not alter that aspect of appellate review. *Id.*; *see, also, Rubinstein v. Adm'rs of Tulane Educ. Fund*, 218 F.3d 392 (5th Cir. 2000) (recognizing impact of *Reeves* on jurisprudence governing review of judgments as a matter of law and holding that, when a case has been fully tried on merits, adequacy of "a party's showing at any particular stage of the *McDonnell Douglas* ritual is unimportant"); *and, Russell v. McKinney Hosp. Venture*, 235 F.3d 219, 224 n. 5 (5th Cir. 2000) (recognized that "the Supreme Court has stated that for a case that is 'fully tried on the merits,' the sufficiency of the *prima facie* case as such is 'no longer relevant.'").

The Third, Fourth, Eighth, Tenth and Eleventh Circuits have taken a similar approach. In *McNulty v. Citadel Broad. Co.*, 2003 U.S. App. LEXIS 3625 *14 (3rd Cir. Feb. 26, 2003), the Third Circuit stated, "Because we review the evidence after a jury verdict, we do not concern ourselves with the *McDonnell Douglas* burden shifting analysis, but proceed to the ultimate issue of whether McNulty has proven

by a preponderance of the evidence that age was a determinative factor in his termination."

In *Dennis v. Columbia Colleton Med. Ctr., Inc.*, 290 F.3d 639, 645 (4th Cir. 2002) (citation omitted), when Colleton attempted to argue that Dennis failed to establish a *prima facie* case on a Rule 50(b) motion for judgment as a matter of law, the court noted that "while [the] argument is couched in terms of *McDonnell Douglas*...that approach is inapposite when a trial has proceeded to completion."

The Eighth Circuit stated that it was "inappropriate to return to the question of whether the plaintiff established a *prima facie* case" when "a court has fully tried a case on the merits" in *Cardenas v. AT&T, Corp.*, 245 F.3d 994, 998 (8th Cir. 2001).

In *Abuan v. Level 3 Communications, Inc.*, 353 F.3d 1158, 1169 (10th Cir. 2003), the Tenth Circuit relied on *Aikens* to explain that "an appellate court's determination that a plaintiff failed to establish a *prima facie* case is not grounds for reversing a jury verdict in the plaintiff's favor." Likewise, the Eleventh Circuit in *Cleveland v. Home Shopping Network*, 369 F.3d 1189, 1194 (11th Cir. 2004), stated that "[a]fter a trial on the merits, an appeals court should not revisit whether the plaintiff established a *prima facie* case."

The Seventh Circuit is divided on the issue. In *Filipovich v. K & R Express Sys., Inc.*, 391 F.3d 859, 863 (7th Cir. 2004), when the parties argued whether or not the plaintiff established a *prima facie* case after a trial on the merits, the court stated, "It is not...whether Filipovich established all the elements of the *prima facie* case outlined in the *McDonnell Douglas v. Green* line of cases...After the trial on the merits, the burden-shifting apparatus has served its purpose and the required preliminary showings fall away."

At least one panel, however, overturned a jury verdict, at least in part, because the plaintiff failed to establish a *prima facie* case. In *Pandya v. Edward Hosp.*, 2001 U.S. App. LEXIS 1141 *6 (7th Cir. Jan. 17, 2001), the court held that "judgment as a matter of law was appropriate because the plaintiff could neither establish a *prima facie* case nor muster any probative evidence that her employer's explanation for her termination was false." The court took it as a given that it could revisit the *prima facie* case and overturn a jury verdict based on that alone.

The Court should grant *certiorari* to clarify whether a reviewing court can completely revisit the *prima facie* case after a jury verdict, or whether the court may review the facts establishing the *prima facie* case as merely one factor to determine discrimination *vel non*.

Even if the court could revisit the *prima facie* case, Petitioner established the fourth prong of the *McDonnell Douglas prima facie* case. The Supreme Court has emphasized that the *McDonnell Douglas* model of the *prima facie* case is not intended to be "rigid, mechanized, or ritualistic" and that its requirements can vary depending upon the factual context. *Furnco*, 438 U.S. at 577. Courts have articulated an alternative formulation of the Title VII case which allows the plaintiff to meet the fourth element if the unfavorable employment action gives rise to an inference of discrimination. *See, e.g., Stella v. Mineta*, 284 F.3d 135, 145 (D.C. Cir. 2002); *EEOC v. Sears Roebuck and Co.*, 243 F.3d 846, 851 n. 2 (4th Cir. 2001); *Kendrick v. Penske Transp. Servs., Inc.*, 220 F.3d 1220, 1227 n. 2 (10th Cir. 2000); *Wilson v. Int'l Bus. Machs. Corp.*, 62 F.3d 237, 241 (8th Cir. 1995). As discussed, supra Part III, Petitioner presented sufficient circumstantial evidence to raise an inference of discrimination.

III. The Majority Substituted Its Judgment for that of the Jury by Weighing the Evidence, Making Credibility Determinations, and Drawing Inferences in Favor of the Movant.

The legal standards governing the method of proving intentional discrimination go to the very heart of the civil rights laws of the United States. For that reason, this Court has, on seven occasions since 1973, granted *certiorari* to establish a rule of law for circumstantially proving an individual disparate treatment case.[2]

This Court attempted to clarify the standard for proving intentional discrimination in *Reeves*, 530 U.S. 133. This Court granted *certiorari* to settle a dispute among the circuit courts of appeals regarding standards on the sufficiency of pretext evidence. *Id.* at 138. There were two important parts of the decision. First, the Court held that a "plaintiff's *prima facie* case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated," effectively rejecting the pretext-plus standard. *Id.* at 138. Next, and perhaps more importantly, the Court held that "in entertaining a motion for judgment as a matter of law, the court should review all of the evidence in the record." *Id.* at 150. The Court continued, stating that "the court must draw all reasonable inferences in favor of the nonmoving party, and it may not make credibility determinations or weigh the evidence." *Id.*

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[2] *Reeves*, 530 U.S. 133; *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993); *Aikens*, 460 U.S. 711; *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981); *Board of Trustees of Keene State College v. Sweeney*, 439 U.S. 24 (1979); *Furnco Construction Co. v. Waters*, 431 U.S. 567 (1978); *McDonnell Douglas v. Green*, 411 U.S. 792 (1973).

Commentators have suggested that this Court's intent was for more discrimination cases to survive summary judgment and be heard by juries, and to uphold jury awards by fighting off Rule 50 motions for judgment as a matter of law.[3] However, the Court's attempt to establish a clear rule of law that would ensure consistent application, both between and among the circuits, has not come to fruition.[4] Although courts are correctly stating the rules of law set forth in *Reeves*, some lower courts are consistently misapplying the rule to limit the scope of pretext cases at will.[5]

The tendency of some circuit courts to grant Rule 50 motions for judgment as a matter of law after *Reeves* is disturbing. A review of the courts of appeals decisions granting or affirming a motion for judgment as a matter of law shows that the Sixth and Seventh Circuits have been at the forefront of overturning jury verdicts.[6] Contrary to *Reeves*,

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[3] *See, e.g.*, Chambers, Henry, L., Jr., "Recapturing Summary Adjudication Principles in Disparate Treatment Cases," 58 SMU L. Rev. 103 (Winter, 2005); *and* Thompson, Charles, F., "Juries Will Decide More Discrimination Cases: An Examination of *Reeves v. Sanderson Plumbing Products, Inc.*," 26 Vt. L. Rev. 1 (Fall, 2001).

[4] *See*, Lanctot, Catherine L., "Secrets and Lies: The Need for a Definitive Rule of Law in Pretext Cases," 61 La. L. Rev. 539 (Spring, 2001).

[5] At least one commentator suggested that some lower courts are not correctly applying *Reeves* because the federal judiciary is generally hostile to employment discrimination cases. *See*, Selmi, Michael, "Why Are Employment Discrimination Cases So Hard to Win?," 61 La. L. Rev. 555 (Spring, 2001).

[6] *Compare* Sixth and Seventh Circuit cases *Moore*, 2005 U.S. App. LEXIS 7970; *Noble*, 391 F.3d 715; *Gatch*, 2004 U.S. App. LEXIS 19105; *Johnson*, 2004 U.S. App. LEXIS 27209; *Roh*, 241 F.3d 491; *Gray*, 263 F.3d 595; *Smith v. Leggett Wire Co.*, 220 F.3d 752 (6th Cir. 2000); *and*, *Filipovich v. K&R Express Sys.*, 391 F.3d 859 (7th Cir. 2004); *Millbrook v. IBP, Inc.*, 280 F.3d 1169 (7th Cir. 2002); *Murray v. Chi.*

many Sixth Circuit panels, including the majority below, weigh evidence, make credibility determinations, and draw inferences in favor of the moving party and substitute the court's judgment for that of a jury.

First, the majority held that "a reasonable jury could not have inferred racial discrimination on the part of Ficorilli based upon the alleged discriminatory prior acts of Lawrence." (App. 15a). The majority acknowledged that the "evidence showed that Ficorilli may have learned of prior problems between Lawrence and [Petitioner] after Lawrence left[,]" but that Ficorilli's "mere knowledge of the conflict between [Petitioner] and Lawrence is insufficient as a matter of law to establish a causal nexus between Lawrence's alleged animosity toward [Petitioner] and Ficorilli's actions." (*Id.*). The majority improperly discounted circumstantial evidence, weighed the evidence, made credibility determinations and drew inferences in favor of Respondent, not the Petitioner.

Specifically, the court stated that Lawrence and Ficorilli never worked together, and Petitioner failed to provide evidence that they ever discussed him. (*Id.*). Petitioner offered evidence that Lawrence and Ficorilli met at least once

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Transit Auth., 252 F.3d 880 (7th Cir. 2001); *Pandya*, 2001 U.S. App. LEXIS 1141; *Massey v. Blue Cross-Blue Shield*, 226 F.3d 922 (7th Cir. 2000); *with* other circuits, *Marcano-Rivera v. Pueblo Int'l, Inc.*, 232 F.3d 245 (1st Cir. 2000); *Mosby v. Norwalk Bd. of Educ.*, No. 00-7520, 2001 U.S. App. LEXIS 2168, (2nd Cir. February 7, 2001); *Schnabel v. Abramson*, 232 F.3d 83 (2nd Cir. 2000); *Blocker v. Avondale Mills, Inc.*, No. 98-2582, 2000 U.S. App. LEXIS 18663 (4th Cir. August 3, 2000); *Vitale v. Ga. Gulf Corp.*, Nos. 02-31195 and 02-31264, 2003 U.S. App. LEXIS 24855, (5th Cir. December 10, 2003); *Montemayor v. City of San Antonio*, 276 F.3d 687 (5th Cir. 2001); *Cardenas*, 245 F.3d 994; *Swenson v. Potter*, 271 F.3d 1184 (9th Cir. 2001); *Teneyck v. Omni Shoreham Hotel*, 365 F.3d 1139 (D.C. Cir. 2004).

to discuss the "challenges" of the restaurant; Lawrence identified Petitioner as one of her "challenges." However, the court stated that Lawrence and Ficorilli testified that they did not discuss Petitioner at this meeting. Despite numerous instances at trial where both Lawrence and Ficorilli were impeached, and despite the fact that both were *not* disinterested witnesses, the majority impermissibly made a credibility determination and believed their testimony. *Reeves* instructs,

> although the court should review the record as a whole, it must disregard all evidence favorable to the moving party that the jury is not required to believe. That is, the court should give credence to the evidence favoring the nonmovant as well as that evidence supporting the moving party that is uncontradicted and unimpeached, at least to the extent that that evidence comes from disinterested witnesses.

530 U.S. at 151 (internal citations and quotations omitted). It was reasonable for the jury to disbelieve Ficorilli and Lawrence. First, they were interested witnesses; second, throughout the trial, the testimony of each had been contradicted and impeached. The jury could have reasonably inferred that both were lying, and that they discussed Petitioner, including his allegations of racial discrimination, at great length.

Despite the limited probative value of the testimony of Ficorilli and Lawrence that they did not discuss Petitioner at their meeting, the majority determined that this evidence, alone, outweighed all the other circumstantial evidence offered by Petitioner that Lawrence's racially discriminatory ideas, beliefs and opinions influenced Ficorilli. Judge Clay noted that "[t]here is no question that there was sufficient evidence for the jury to conclude that Lawrence's

discriminatory animus somehow influenced Ficorilli's termination decision." (App. 41a).

Petitioner offered the following testimony as proof that Lawrence's racial animosity influenced Ficorilli's termination decision: Lawrence's testimony that she discussed the "challenges" of operating the restaurant with Ficorilli on at least one occasion, and that she testified that she regarded Petitioner as one of her "challenges"; that Wiseman worked for both Lawrence and Ficorilli and knew of the hostility Lawrence felt for Petitioner because of his race; that Wiseman informed Lawrence of Petitioner's allegations of racial discrimination and Petitioner's threat of possible legal action before she relocated; and that Ficorilli had access to the managers' logbooks and Petitioner's personnel file, both of which contained information regarding the animosity between Lawrence and Petitioner. Most importantly is the fact that Wiseman testified that, "at the time that [Petitioner] missed a shift," Wiseman told Ficorilli that Petitioner had "threatened to go to both the NAACP and the labor board and report racial discrimination or accuse [them] of racial discrimination." The very next day, Ficorilli terminated Petitioner. (App. 39a). The majority ignored the importance of this, and other, circumstantial evidence.

Ficorilli testified that he rigorously enforced the no call/no show policy, but it took him a full week of no calls/no shows to make a notation in the manager's book that he terminated Will. (*Id.* at 37a, n. 1). Finally, the majority discounted the testimony of Wiseman, an assistant manager, who testified that, in his experience, no one was ever terminated for their first violation of the no call/no show policy. The majority stated that such evidence "is of no avail" because Petitioner had the burden to establish a similarly situated employee outside the protected class was treated more favorably than Petitioner. The majority disregarded important

"circumstantial evidence [that] raised an inference of discrimination." (*Id.* at 38a).

Judge Clay also explained that the majority misapplied the fourth prong of the *prima facie* case. First, the dissent acknowledged that "the real issue is whether Ficorilli should have applied the no call/no show policy to [Petitioner] in the first place[,]" because Petitioner "never violated [the policy]." (*Id.* at 37a). Under these circumstances, finding a similarly situated person, *i.e.*, someone who did not violate the no call/no policy yet was terminated, would be nearly impossible. Employees are generally not terminated for infractions they do not commit. Thus, the proper comparison shows that "[w]hereas Ficorilli terminated Brahler for violating that policy, Ficorilli terminated [Petitioner] for violating the policy even though Ficorilli knew (or so the jury could have found) that [Petitioner] had not violated it." (*Id.*). The dissent stated, "This is the quintessence of disparate treatment." (*Id.*).

The application of *Reeves* in the Sixth and Seventh Circuits is inconsistent both within their own circuits and with other circuits. The Court should grant *certiorari* to ensure uniform application of *Reeves* among the Circuits.

CONCLUSION

For the foregoing reasons, the petition for a writ of *certiorari* should be granted.

Respectfully Submitted,

Laren E. Knoll
Counsel of Record
KENNEDY REEVE & KNOLL
98 Hamilton Park
Columbus, Ohio 43203
(614) 228-2050

Dennis M. McGuire
3380 Stonemason Way
Columbus, Ohio 43221
(614) 529-9117

Counsel for Petitioner

Dated: June 1, 2005

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 02-4190

[March 4, 2005, Filed]

MARCUS A. NOBLE, Plaintiff-Appellee,	)
v.	)
BRINKER INTERNATIONAL, INC., Defendant-Appellant.	)

ORDER

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the

case. Accordingly, the petition is denied. Judge Clay would grant rehearing for the reasons stated in his dissent.

ENTERED BY ORDER OF THE COURT

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 02-4190

[December 3, 2004, Filed]

Marcus A. Noble,	)
Plaintiff-Appellee,	)
	)
v.	)
	)
Brinker International, Inc.,	)
Defendant-Appellant.	)
	)

OPINION

RYAN, Circuit Judge. In this civil rights case, the plaintiff, Marcus A. Noble, alleges that the defendant, Brinker International, Inc., acting by and through its agent, Anthony Ficorilli, terminated Noble's employment because of his race. After a jury found in favor of the plaintiff, the defendant filed a motion for judgment as a matter of law or, in the alternative, for a new trial. This motion was denied, and the defendant now appeals from the district court's denial of its motion.

The legal issue presented--whether the district court erred in denying the defendants' request for judgment as a matter of law--is relatively simple, but the answer is obtained, for reasons we shall explain, only by conducting a close examination of the facts of the case in order to determine whether they are legally sufficient to support the jury's finding of intentional race discrimination. Therefore, we must burden our opinion with an extensive discussion of those facts, which, as will be explained, do not support the jury's verdict and should have resulted in a judgment for the defendant, as a matter of law. Therefore, we must reverse.

I.

A.

The defendant, Brinker International, is a holding company whose subsidiaries operate a number of concept restaurants throughout the country; one of these restaurants is Romano's Macaroni Grill in Worthington, Ohio. Noble, a black male, began working as a server at the Macaroni Grill on July 9, 1998. At that time, Linda Lawrence worked as the restaurant's general manager. Noble claims that Lawrence subjected him to disparate treatment in the terms and conditions of his employment during her tenure as general manager of the restaurant. Noble complained to Lawrence and others about what he perceived to be Lawrence's racial discrimination. Noble was permitted to introduce a significant amount of evidence at trial pertaining to Lawrence's allegedly discriminatory treatment of him and other minority employees.

In January 1999, however, Lawrence transferred out of the Worthington Macaroni Grill to a Macaroni Grill in Maine. Anthony Ficorilli replaced her as general manager of the restaurant. After Lawrence transferred out of Ohio, she and

Ficorilli met once to discuss the restaurant. Both testified that they did not discuss Marcus Noble. Noble testified that "things were a lot better" after Ficorilli came to the restaurant. At trial, Noble testified that "99.9 percent" of the "threats and harassment" he experienced at the restaurant came from Lawrence. In his sworn deposition, also introduced at trial, Noble testified that no one but Lawrence subjected him to "threats and harassment." Noble never complained to Ficorilli or anyone else that any of the actions taken by Ficorilli prior to Noble's termination were taken on account of race.

On Thursday, April 15, or Friday, April 16, 1999, Ficorilli noticed that he had an evening shift that needed to be covered by a server that Saturday, April 17, 1999. Ficorilli claims that he asked Noble if he would be willing to cover the shift, and Noble agreed to do so. Ficorilli states that he confirmed the arrangement with Noble at least twice during their conversation. The alleged understanding between Ficorilli and Noble was not noted in the place in which such shifts are usually recorded, and Brinker was unable to produce any written record of the agreement. After Noble did not appear for work on Saturday and did not call to explain his absence, Ficorilli stated that he decided to discharge Noble for failing to appear for work or call on Saturday, April 17, 1999. An assistant manager testified that he mentioned Noble's prior claims of discrimination to Ficorilli "at the time that [Noble] had missed a shift . . . that he had agreed to work for Tony Ficorilli." Aside from the assistant manager's testimony that he made Ficorilli "aware that there was a history there," there was no evidence that Ficorilli was otherwise aware of the prior contentious history between Lawrence and Noble. When Noble attempted to return to work on Sunday, April 18, he was informed that he had been

terminated for being a "no call/no show" the previous evening.

Noble, on the other hand, claims that he never agreed to cover a shift on Saturday, April 17, 1999. He contends that Ficorilli fabricated the incident to provide grounds for firing him. Noble argues that the real reason for his termination was his race.

B.

Noble filed suit, alleging that both Lawrence's actions and Ficorilli's decision to terminate his employment violated 42 U.S.C. § 2000e-2(a)(1) (Title VII), 42 U.S.C. § 1981, Ohio Revised Code § 4112, and Ohio public policy. Brinker filed a motion for summary judgment, which the district court granted only as to Noble's Ohio public policy claim. The court denied Brinker's motion with respect to Noble's claims brought under the above-mentioned sections of state and federal law. Although denying Brinker's motion for summary judgment, the district court held that the only adverse employment action to which Noble had been subjected was his termination. That is, the court held that the discriminatory treatment Noble allegedly suffered at the hands of Lawrence was not actionable.

The case proceeded to trial, but the district court dismissed the jury after it was unable to reach a unanimous verdict. The case again proceeded to trial, and Brinker moved for judgment as a matter of law at the end of the plaintiff's case-in-chief, again at the end of the defendant's case, and again at the close of all evidence. These motions were denied. The jury returned a verdict in favor of the plaintiff, and the district court entered judgment accordingly. Brinker filed a renewed motion for judgment as a matter of law or, in the

alternative, for a new trial. The district court denied this motion as well, and Brinker now appeals.

II.

We review a district court's denial of a motion for judgment as a matter of law or a renewed motion for judgment as a matter of law *de novo*. *United States v. Alpine Indus., Inc.*, 352 F.3d 1017, 1022 (6th Cir. 2003). "In doing so, we use the same standard of review used by the district court." *Id.* That is, judgment as a matter of law "may be granted only if in viewing the evidence in the light most favorable to the non-moving party, there is no genuine issue of material fact for the jury, and reasonable minds could come to but one conclusion, in favor of the moving party." *Gray v. Toshiba Am. Consumer Prods., Inc.*, 263 F.3d 595, 598 (6th Cir. 2001).

III.

A.

Title VII forbids an employer "to . . . discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1).

> The Ohio courts have held that the evidentiary standards and burdens of proof applicable to a claimed violation of Title VII . . . are likewise applicable in determining whether a violation of Ohio Rev. Code § 4112 has occurred. Thus, the federal case law

> governing Title VII actions is generally applicable to cases involving alleged violations of Chapter 4112.

Williams v. Ford Motor Co., 187 F.3d 533, 538 (6th Cir. 1999). Finally, 42 U.S.C. §1981 prohibits racial discrimination in the making and enforcing of private contracts. *See* 42 U.S.C. § 1981. "The elements of [a] *prima facie* case as well as the allocations of the burden of proof are the same for employment claims stemming from Title VII and § 1981." *Johnson v. Univ. of Cincinnati*, 215 F.3d 561, 573 n.5 (6th Cir. 2000) (citing *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 113 S. Ct. 2742, 125 L. Ed. 2d 407 (1993)).

B.

Brinker argues that "the district court erred in denying [the defendant's renewed] motion for judgment as a matter of law because there was no legally sufficient evidentiary basis for a reasonable jury to find for Noble on his claim of illegal discrimination." Among other things, Brinker argues that it was entitled to judgment as a matter of law because "Noble . . . failed to establish a *prima facie* case of discrimination and [did] not present[] evidence to support his claim that [the defendant] discharged him because of his race."

When entertaining a motion for judgment as a matter of law following a trial on the merits in a Title VII case, "'a reviewing court should not focus on the elements of the prima facie case but should assess the ultimate question of discrimination.'" *Gray*, 263 F.3d at 599 (quoting *Kovacevich v. Kent State Univ.*, 224 F.3d 806, 821 (6th Cir. 2000)). The Supreme Court has explained:

> when the defendant fails to persuade the district court to dismiss the action for lack of a prima facie case,

> and responds to the plaintiff's proof by offering evidence of the reason for the plaintiff's [termination], the factfinder must then decide whether the [termination] was discriminatory within the meaning of Title VII. At this stage, the *McDonnell-Burdine* presumption "drops from the case," and "the factual inquiry proceeds to a new level of specificity."

U.S. Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 714-15, 103 S. Ct. 1478, 75 L. Ed. 2d 403 (1983) (footnote and internal citations omitted). That is, "the sole remaining issue [is] 'discrimination *vel non.*'" *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 143, 120 S. Ct. 2097, 147 L. Ed. 2d 105 (2000) (quoting *Aikens*, 460 U.S. at 714). Consequently, "we cannot simply hold that the plaintiff's failure to provide evidence of an essential element of [his] prima facie case is dispositive here. Rather, we must look to the ultimate question--whether the plaintiff has proven that [his] discharge was intentionally discriminatory." *Gray*, 263 F.3d at 599.

In this case, the district court denied Brinker's motion for summary judgment, holding, *inter alia*, that Noble had established a *prima facie* case of race discrimination with respect to his termination. *Noble v. Brinker Int'l, Inc.*, 175 F. Supp. 2d 1027, 1038 (S.D. Ohio 2001). As the district court was not persuaded to dismiss this suit for lack of a *prima facie* case, and as Brinker did "everything that would be required of [it] if the plaintiff had properly made out a prima facie case, whether the plaintiff really did so is no longer relevant." *Aikens*, 460 U.S. at 715. Stated otherwise, we are not permitted to decide whether the district court erred in holding that Noble made out a *prima facie* case. Instead, our duty, given *Aikens*, is simply to determine whether Noble produced sufficient evidence to support the jury's finding of

intentional discrimination. *See Gray*, 263 F.3d at 599; *Kovacevich*, 224 F.3d at 821.

C.

"The ultimate question in every employment discrimination case involving a claim of disparate treatment is whether the plaintiff was the victim of intentional discrimination." *Reeves*, 530 U.S. at 153; *see also Hicks*, 509 U.S. at 511; *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981). "'The ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff.'" *Hicks*, 509 U.S. at 518 (quoting *Burdine*, 450 U.S. at 253). "'[The plaintiff] may succeed in this [*i.e.*, in persuading the court that she has been the victim of intentional discrimination] either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence.'" *Id.* at 517 (quoting *Burdine*, 450 U.S. at 256). With respect to the indirect method of proof, which is what is involved in this case, the Supreme Court has said that "it is not enough . . . to *dis*believe the employer; the factfinder must *believe* the plaintiff's explanation of intentional discrimination." *Id.* at 519 (emphasis in original). The Court explained that "Title VII does not award damages against employers who cannot prove a nondiscriminatory reason for adverse employment action, but only against employers who are proven to have taken adverse employment action by reason of (in the context of the present case) race." *Id.* at 523-24.

Nevertheless, disbelief of an employer's proffered reason may play an important role in a Title VII case that is proceeding under the indirect method of proof. In *Hicks*, the

Supreme Court explained that "the factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination." *Id.* at 511. The Supreme Court reiterated this standard in *Reeves*, holding that "a plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated." *Reeves*, 530 U.S. at 148. The Court explained that "proof that the defendant's explanation is unworthy of credence is simply one form of circumstantial evidence that is probative of intentional discrimination, and it may be quite persuasive." *Id.* at 147. *Reeves* did not, however, abrogate the Court's holding in *Hicks* that mere disbelief of an employer's proffered reason is insufficient to support a finding of intentional discrimination.

With these principles in mind, we turn to an examination of the evidence presented by Noble in support of his claim that he was discharged because of his race. "Under Rule 50, a court should render judgment as a matter of law when 'a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue.'" *Id.* at 149 (citation omitted). If, in this case, there is no legally sufficient evidentiary basis for a reasonable jury to find that Noble was discharged because of his race, we must reverse.

1.

Noble presented a great deal of evidence at trial which, when viewed in the light most favorable to the plaintiff, tended to show that *Linda Lawrence* may have harbored racial animosity toward Noble and other black employees at the restaurant. Noble claimed that "immediately upon beginning work, [he] experienced discriminatory treatment from Ms. Lawrence." He presented evidence from which a jury might have concluded that Lawrence discriminated against him in the administration of an oral examination which tested the plaintiff's knowledge of the menu. He also presented evidence that may have shown that Lawrence unjustifiably harassed him concerning his work at another Brinker restaurant. Noble accused Lawrence of instructing a hostess not to seat patrons in his section because of his race. He alleged that Lawrence wrote him up for infractions, while she did not write up white employees for similar infractions. He further alleged that Lawrence wrote him up for infractions he did not commit. These write-ups eventually led to a suspension that Noble contends was motivated by racial animosity. Noble also presented evidence at trial from which a jury might have concluded that Lawrence otherwise harassed and threatened him on account of his race and treated other black employees in a discriminatory manner. In light of all of this evidence, it is hardly surprising the jury was persuaded to compensate Noble.

Nevertheless, there is a problem. "While this evidence might raise an inference of discrimination regarding plaintiff's treatment while employed, this is not the wrong for which plaintiff seeks recovery; *viz.*, discriminatory discharge . . . ." *Shah v. Gen. Elec. Co.*, 816 F.2d 264, 271 (6th Cir. 1987). As we have noted, the district court held that none of the above-mentioned actions resulted in an actionable "adverse

employment action." Furthermore, Lawrence did not discharge Noble. In fact, she was no longer the manager at the time; she had not worked in that restaurant during the three months immediately preceding Noble's discharge; and she worked halfway across the country at the time of the discharge. Noble testified that Lawrence was the only person who discriminated against him on the basis of race during his tenure at the Worthington Macaroni Grill. Noble never complained to Ficorilli or anyone else that any of the actions taken by Ficorilli, aside from his presently contested discharge, were taken on account of his race. Furthermore, Noble produced no evidence that Ficorilli otherwise engaged in a pattern or practice of racial discrimination against minorities or anyone else. Instead, Noble seeks to impute the alleged racial animus of Lawrence, who was neither present nor a decisionmaker, to Ficorilli.

We must consider, therefore, whether Noble presented sufficient evidence to impute Lawrence's alleged racial animus to Ficorilli. *See, e.g., Christian v. Wal-Mart Stores, Inc.*, 252 F.3d 862, 876 (6th Cir. 2001); *Wilson v. Stroh Cos.*, 952 F.2d 942, 946 (6th Cir. 1992). Although we usually encounter the issue of imputation in the context of imputing the comments or actions of a subordinate to a manager or other decisionmaker, *see, e.g., Christian*, 252 F.3d 862; *Wilson*, 952 F.2d 942, the same principles apply here, where Noble seeks to impute the alleged animus of one manager, Lawrence, to a succeeding manager, Ficorilli. In cases of this type, "the determinative question is whether [the plaintiff] has submitted evidence that [a particular employee's] racial animus was a cause of the termination." *Wilson*, 952 F.2d at 946. In other words, a plaintiff must submit competent evidence that one employee's "discriminatory motives somehow influenced" the decisionmaker. Id.

Noble has presented no evidence from which a reasonable jury could impute Lawrence's alleged racial animus to Ficorilli. Noble cites cases in which courts have found an adequate nexus where the decisionmaker relied on the assessment or evaluation of a "tainted" employee. *See, e.g., Christian*, 252 F.3d 862; *Shager v. Upjohn Co.*, 913 F.2d 398 (7th Cir. 1990). These cases are of no help to Noble, who presented no evidence that Ficorilli in any way relied on Lawrence's evaluations or opinions, or otherwise acted as Lawrence's "cat's-paw." *See Shager*, 913 F.3d at 405. The "cat's-paw" theory is simply inapplicable to the facts of this case. Furthermore, Noble presented no evidence that Lawrence's alleged opinions or attitudes influenced Ficorilli's decision to terminate the plaintiff or otherwise caused the plaintiff's discharge. *See Wilson*, 952 F.2d at 946. Lawrence and Ficorilli never worked together, and they met only once. Noble presented no evidence showing that Lawrence and Ficorelli ever discussed Noble. In fact, the only evidence presented at trial shows that they did not. *Cf. Wells v. New Cherokee Corp.*, 58 F.3d 233, 237-38 (6th Cir. 1995). In Wells, we imputed a supervisor's animus to the ultimate decisionmaker because the evidence showed that the two "worked closely together and consulted with each other on personnel decisions. [They] themselves testified that they acted jointly." *Id.* at 238. There is no such evidence in this case. Nor is there any evidence that Lawrence had any role in Noble's termination, that she occupied any significant role in the corporate hierarchy, or that there was a direct temporal nexus between her allegedly discriminatory conduct and the adverse employment action. *See Ercegovich v. Goodyear Tire & Rubber Co.*, 154 F.3d 344, 357 (6th Cir. 1998).

The evidence showed that Ficorelli may have learned of prior problems between Lawrence and Noble after Lawrence left. Noble argues that Ficorilli's mere knowledge of the

contentious history between Lawrence and Noble "was enough to create an issue of 'causal nexus' that was properly submitted to the jury." We disagree. Ficorilli's mere knowledge of the conflict between Noble and Lawrence is insufficient as a matter of law to establish a causal nexus between Lawrence's alleged animosity toward Noble and Ficorilli's action. *See Wilson*, 952 F.2d at 946. Noble speculates that Lawrence's contaminated perception of him must have been transmitted to Ficorilli, and Ficorilli must have been contaminated by racism as well. Although Noble is certainly entitled to his opinion, mere speculation cannot satisfy his burden of proving that Ficorilli discharged him on account of race.

In short, Noble failed to present evidence that could establish a causal nexus between Lawrence's allegedly discriminatory treatment of Noble and Ficorilli's subsequent decision to terminate the plaintiff's employment. Unless the statements or conduct of nondecisionmakers can be imputed to the ultimate decisionmaker, such statements or conduct "'[can not] suffice to satisfy the plaintiff's burden . . .' of demonstrating animus." *Bush v. Dictaphone Corp.*, 161 F.3d 363, 369 (6th Cir. 1998) (quoting *Price Waterhouse v. Hopkins*, 490 U.S. 228, 277, 109 S. Ct. 1775, 104 L. Ed. 2d 268 (1989) (O'Connor, J., concurring)); see also *Cardenas v. AT&T Corp.*, 245 F.3d 994, 1000 (8th Cir. 2001). Accordingly, we hold that a reasonable jury could not have inferred racial discrimination on the part of Ficorilli based upon the allegedly discriminatory prior acts of Lawrence. But that does not end the matter.

2.

Aside from the evidence regarding Lawrence's alleged animus, Noble seeks to rely on the rule from *Reeves*, which he states as follows: "a prima *facie* case coupled with evidence that employers [sic] asserted justification is false may permit a trier of fact to conclude the employer unlawfully discriminated." The plaintiff argues that he has "clearly met his burden" under this standard. First, he argues that there was sufficient evidence to support the jury's rejection of the defendant's proffered reason for this discharge. Second, Noble argues that as there was sufficient evidence to support the jury's rejection of the defendant's proffered reason, the district court properly denied the defendant's motion for judgment as a matter of law. He offers two reasons why this is so. We shall address each of these arguments in turn.

a.

We have carefully examined the record, the briefs, and the parties' oral arguments, and we are satisfied that Noble presented sufficient evidence to permit a reasonable jury to reject the defendant's proffered reason for Noble's termination. We have "held that 'the jury may not reject an employer's explanation . . . unless there is a sufficient basis in the evidence for doing so.'" *Gray*, 263 F.3d at 600 (emphasis omitted) (quoting *Manzer v. Diamond Shamrock Chems. Co.*, 29 F.3d 1078, 1083 (6th Cir. 1994)). In this case, the parties vigorously dispute whether Noble was actually scheduled to work on Saturday, April 17, 1999. Noble argues that he did not agree to pick up the shift, while Ficorilli contends that he did. There was no written evidence confirming that Noble was, in fact, scheduled to work on that day. Consequently, the question whether the defendant's proffered reason had a basis in fact came down to a credibility

determination between two witnesses. "Witness credibility is solely within the jury's province, and this court may not remake credibility determinations." *United States v. L.E. Cooke Co.*, 991 F.2d 336, 343 (6th Cir. 1993); *see also Wells*, 58 F.3d at 237. Accordingly, we conclude that a reasonable jury could have found that Brinker's proffered reason had no basis in fact, which is a sufficient ground for rejecting an employer's explanation. *See Gray*, 263 F.3d at 600.

b.

In light of *Reeves* and the sufficiency of the evidence supporting the jury's rejection of the defendant's proffered reason, Noble argues that we must affirm because we are "precluded from considering whether [he] proved his *prima facie* case." He argues that the district court's ruling that he had, in fact, made out a *prima facie* case is determinative; "this was a preliminary matter, which cannot be revisited at a later time." Noble relies on the Supreme Court's holding in *Aikens*, as well as our holding in *EEOC v. Avery Dennison Corp.*,104 F.3d 858 (6th Cir. 1997). In *Aikens*, the Supreme Court stated that "when the defendant fails to persuade the district court to dismiss the action for lack of a prima facie case," and when the case proceeds to a full trial on the merits, the district court is "in a position to decide the ultimate factual issue in the case," that is, "'[whether] the defendant intentionally discriminated against the plaintiff.'" 460 U.S. at 714-15 (quoting *Burdine*, 450 U.S. at 253). At that point, it is no longer material whether the plaintiff in fact properly made out a *prima facie* case. *Id.* at 715. "*Avery Dennison* stands for the simple proposition that in reviewing the facts of a discrimination claim after there has been a full trial on the merits, a district court or an appellate court must focus on the ultimate question of discrimination rather than on whether a

plaintiff made out her prima facie case." *Kovacevich*, 224 F.3d at 825. The *Avery* court stated that "following a trial on the merits, [neither] the district court [nor this court], therefore, can[] return to a consideration of whether plaintiff has proven its *prima facie* case. This is a preliminary matter which cannot be revisited at a later time." 104 F.3d at 861. The *Avery* court further explained this point, stating: "The proper inquiry following the presentation of all evidence in a Title VII case is whether plaintiff has proven its case by a preponderance [of the evidence] . . . . At this stage in the case, the relevant inquiry should not be whether plaintiff has proven its *prima facie* case." *Id.* at 862. But that is not to say that the evidentiary underpinnings of a plaintiff's *prima facie* case are irrelevant or insulated from examination by this court to aid its determination whether the evidence *in toto* is sufficient to support a finding of intentional discrimination.

In *Reeves*, the Supreme Court held that, in appropriate circumstances, "a plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated." 530 U.S. at 148. Noble seeks to synthesize the holdings in *Aikens*, *Avery*, and *Reeves* as establishing a rule that once the trial court has ruled that a *prima facie* case has been shown and the case has proceeded to trial, the evidence introduced in support of the *prima facie* case "drops out of the picture," with the result that a plaintiff is immune from judgment as a matter of law so long as there is sufficient evidence to warrant the jury's rejection of the employer's proffered reason.

We reject Noble's reading of these cases because it is inconsistent with the Supreme Court's teachings. Noble's argument might have more force if it were not for the Supreme Court's holding in *Hicks*. As noted above, the

Court held that it is not sufficient for a jury to merely disbelieve the reason offered by the defendant. *Hicks*, 509 U.S. at 519. "That the employer's proffered reason is unpersuasive, or even obviously contrived, does not necessarily establish that the plaintiff's proffered reason of race [discrimination] is correct." *Id.* at 524. Instead, the jury must believe the reason offered by the plaintiff, that is, it must believe that the plaintiff was the victim of intentional discrimination. *Id.* at 519. The Court stated that "proving the employer's reason false becomes part of (and often considerably assists) the *greater enterprise* of proving that the real reason was intentional discrimination." *Id.* at 517 (emphasis added). Nevertheless, Noble asks this court to hold that as we may not return to a consideration of whether a plaintiff has proven a *prima facie* case, we must affirm the district court's denial of the defendant's motion for judgment as a matter of law simply because there was sufficient evidence to support the jury's rejection of the defendant's proffered reason. Such a rule would cut the heart out of *Hicks*, and we are not free to do so.

Noble's argument must also be rejected because it is inconsistent with *Reeves* itself. In that case, a plaintiff in an age discrimination case obtained a favorable verdict from a jury. *Reeves*, 530 U.S. at 139. The district court denied the defendant's renewed motion for judgment as a matter of law (judgment notwithstanding the verdict), and the defendant appealed. *Id.* The Fifth Circuit reversed, holding that the plaintiff "had not introduced sufficient evidence to sustain the jury's finding of unlawful discrimination." *Id.* As in this case, the court of appeals "acknowledged that [the plaintiff] 'very well may' have offered sufficient evidence for 'a reasonable jury [to] have found that [the defendant's] explanation for its employment decision was pretextual.'" *Id.* (citation omitted). The Supreme Court stated that the Fifth Circuit had erred by

"ignoring the evidence supporting [the plaintiff's] prima facie case and challenging respondent's explanation for its decision." *Id.* at 146. It was error for the appellate court to demand *additional* evidence of discrimination from the plaintiff. *Id.*

Although it is not necessary for a plaintiff to introduce additional evidence of discrimination, *id.*, it is certainly permissible for a plaintiff to prove his case by doing so. For this reason, we undertook the above evaluation of the additional evidence Noble presented. Although Noble's failure to produce additional evidence is not, by itself, fatal to his claim, we must determine whether Noble satisfied the standard articulated in Reeves.

If the law were as Noble contends, *Reeves* would have held merely that sufficient evidence to find that an employer's asserted justification is false may permit the trier of fact to conclude that the employer unlawfully discriminated. The *Reeves* Court was well aware of its prior holding in *Aikens* and quoted extensively from it, but the Court nevertheless required that a plaintiff present *both* evidence supporting a *prima facie* case *and* evidence sufficient to support the factfinder's disbelief of the defendant's proffered reason. *Id.* at 148. In fact, the Court criticized the court of appeals for "ignoring the evidence supporting [the plaintiff's] prima facie case." *Id.* at 146. The Court explained *Aikens*, stating "although the presumption of discrimination 'drops out of the picture' once the defendant meets its burden of production, the trier of fact may still consider the evidence establishing the plaintiff's prima facie case 'and inferences properly drawn therefrom.'" *Id.* at 143 (citations omitted). Likewise, in reviewing a Rule 50 motion, it is appropriate for a court to "consider the evidence establishing the plaintiff's prima facie case." *Id.* In *Reeves*, the Court reexamined each element of

the plaintiff's *prima facie* case, stating "it is undisputed that [the plaintiff] satisfied this burden here." *Id.* at 142. If *Aikens* stood for the proposition that an appellate court must always assume that there is evidence supporting what the lower court accepted as the plaintiff's *prima facie* case, the Supreme Court's reasoning and holding in *Reeves* would be inexplicable. *Aikens* and *Avery* make clear that a court may not, after a trial on the merits, grant judgment as a matter of law *merely because* the plaintiff failed to establish a *prima facie* case, but when the indirect method of proof is the only remaining avenue by which a plaintiff can establish his claim of intentional discrimination, it is necessary and appropriate for a court to evaluate the evidence supporting the plaintiff's *prima facie* case. In fact, the Supreme Court's criticism of the Fifth Circuit in *Reeves* demands as much. To hold as Noble requests "would be effectively to insulate an entire category of employment discrimination cases from review under Rule 50, and [the Supreme Court has] reiterated that trial courts should not 'treat discrimination differently from other ultimate questions of fact.'" *Reeves*, 530 U.S. at 148 (quoting Hicks, 509 U.S. at 524 (quoting *Aikens*, 460 U.S. at 716)).

Our conclusion is supported by the reasoning of this court and other courts. In *Kovacevich*, we reaffirmed *Avery* but explained: "Of course, there is nothing to prevent the court from considering evidence that also bears on that prima facie case as long as it does so in order to address the ultimate question of discrimination." 224 F.3d at 825; *see also Gray*, 263 F.3d at 600; *Roh v. Lakeshore Estates, Inc.*, 241 F.3d 491, 497-99 (6th Cir. 2001). In *Peters v. Lincoln Electric Co.*, 285 F.3d 456 (6th Cir. 2002), we stated: "An outcome consistent with *Reeves* is still dependent on [the plaintiff's] *prima facie* case *and* his showing by a preponderance of the evidence that [the defendant's] asserted reason was false." *Id.* at 473 (emphasis in original). In *Brown v. Packaging*

Corp. of America, 338 F.3d 586 (6th Cir. 2003), we noted that, *Aikens* notwithstanding, the "elements of a prima facie case frequently are still relevant after the case has gone to the jury." *Id.* at 597 n.3 (Clay, J., writing separately for the court with respect to Part II.B of the opinion).

> The Court of Appeals for the D.C. Circuit has explained:
>
> Of course, the case has been tried, so the question whether [the plaintiff] established a prima facie case is now irrelevant. This does not mean, however, that in our analysis of "the ultimate question of discrimination vel non," we are obliged to pretend that there is evidence supporting a prima facie case when in fact there is not. . . . Because that evidence standing alone has virtually no probative value, we conclude that the district court should have granted the [defendant's] motion for judgment as a matter of law.

Barbour v. Browner, 337 U.S. App. D.C. 50, 181 F.3d 1342, 1347 (D.C. Cir. 1999) (internal citations omitted). The Third Circuit has stated, citing *Aikens*, that when reviewing "evidence after a jury verdict, we do not concern ourselves with the *McDonnell Douglas* burden shifting analysis, but proceed to the ultimate issue of whether [the plaintiff] has proven [discrimination] by a preponderance of the evidence." *McNulty v. Citadel Broad. Co.*, 58 Fed. Appx. 556, Nos. 01-3902/4046, 2003 WL 500171, at *5 (3d Cir. Feb. 26, 2003) (unpublished disposition). Nevertheless, the court explained: "In so doing . . . our inquiry into the sufficiency of the evidence does not differ markedly from inquiring into whether [the plaintiff] has submitted evidence sufficient to establish the elements of a prima facie case and then sustained his burden of proving that [the defendant's] reasons were a mere pretext

. . . ." *Id.; see also EEOC v. Bd. of Regents of Univ. of Wis. Sys.*, 288 F.3d 296, 301-02 (7th Cir. 2002); *Combs v. Plantation Patterns*, 106 F.3d 1519, 1539 n.11 (11th Cir. 1997).

In light of *Reeves, Hicks*, and the other cases we have cited and discussed, we reject Noble's argument that this court must affirm a district court's denial of a motion for judgment as a matter of law whenever a plaintiff has presented sufficient evidence to support the jury's rejection of the defendant's proffered justification. At the risk of redundance, "it is not enough . . . to *dis*believe the employer; the factfinder must believe the plaintiff's explanation of intentional discrimination." *Hicks*, 509 U.S. at 519. Accordingly, we must determine whether Noble presented sufficient evidence to permit a reasonable jury to "*believe* the plaintiff's explanation of intentional discrimination." Id.

c.

We have carefully examined the record, the parties' arguments, and the law, and we conclude that Noble failed to carry his burden of proof with respect to "the ultimate question of discrimination." As noted above, because this case has been tried on the merits, the question now before us is one of "discrimination vel non," not simply whether Noble failed to make out a *prima facie* case. *Aikens*, 460 U.S. at 714. Nevertheless, as in *Reeves*, we turn to an examination of the evidence supporting the elements of Noble's *prima facie* case because that alternative is the only remaining avenue by which Noble might raise the inference of discrimination necessary to sustain the jury's verdict.

Noble argues that he did, in fact, present sufficient evidence before the district court to support a *prima facie*

case. It is undisputed that Noble introduced evidence to support the first three elements of his *prima facie* case; that is, (1) he was a member of a protected class; (2) he suffered an adverse employment action; and (3) he was qualified for the position from which he was discharged. *See Clayton v. Meijer, Inc.*, 281 F.3d 605, 610 (6th Cir. 2002). A plaintiff may make out the fourth element of a *prima facie* case by showing that he was either replaced by someone outside the protected class or treated differently than similarly situated, non protected employees. *See Carter v. Univ. of Toledo*, 349 F.3d 269, 273 (6th Cir. 2003); *Clayton*, 281 F.3d at 610. Noble does not argue that he was replaced by someone outside the protected class; instead, he points out that "in order to make his *prima facie* case, [he] offered Michael Brahler as a similarly-situated white employee . . . ." Noble also makes an oblique reference to "an employee named 'Will.'"

Absent proof that employees outside the protected class were similarly situated but were not discharged, Noble presented no evidence that could have permitted a reasonable jury to conclude that the defendant, acting by and through Ficorilli, intentionally discriminated against the plaintiff because of his race. For the following reasons, we conclude that Noble also failed to produce evidence showing that a similarly situated employee outside the protected class was not discharged.

i.

We have held that to be considered "similarly situated" in the disciplinary context, "the plaintiff must show that the 'comparables' are similarly-situated *in all respects*." *Mitchell v. Toledo Hosp.*, 964 F.2d 577, 583 (6th Cir. 1992) (emphasis in original). In later cases, we clarified that "the

plaintiff and the employee with whom the plaintiff seeks to compare himself or herself must be similar[, that is, 'nearly identical,'] in 'all of the *relevant* aspects.'" *Ercegovich*, 154 F.3d at 352 (emphasis in original) (citation omitted).

> Thus, to be deemed "similarly-situated", [sic] the individuals with whom the plaintiff seeks to compare his/her treatment must have dealt with the same supervisor, have been subject to the same standards and have engaged in the same conduct without such differentiating or mitigating circumstances that would distinguish their conduct or the employer's treatment of them for it.

Mitchell, 964 F.2d at 583.

ii.

Applying the above standard to this case, it is evident that Noble failed to identify a similarly situated employee outside the protected class who was treated more favorably than he. The two employees to whom Noble seeks to compare himself differ from him in several significant ways.

First, Noble seeks to compare himself to Michael Brahler. Brahler, a white male, also worked under Ficorilli at the Macaroni Grill. Noble argues that he is similarly situated to Brahler because both employees allegedly missed shifts and failed to call, that is, both employees were "no call/no shows." Noble contends that the evidence presented at trial showed "that Mr. Brahler failed to appear for over one week to any of his shifts, and was not terminated until after he had missed a full week of work." Noble, on the other hand, was terminated after allegedly missing only a single shift. Thus,

Noble concludes that he has shown that he was treated less favorably than a similarly situated white employee.

Although we are required to view the evidence in the record in the light most favorable to the non-moving party, Noble, we are not required to accept his unsubstantiated gloss on the evidence. The record reveals two instances in which Brahler failed to appear for work. In the first instance, Brahler's "car broke down on the highway." He "called in and . . . told [the manager] the story and . . . when [he] got everything situated and [he] called them back, they said don't bother to come in. It's slow." Brahler was later required "to show a little proof of . . . an estimate for [his] car; that it was actually broken . . . [to] make sure [he] wasn't lying." Brahler called in to the restaurant and informed his manager that he would be unable to make his shift; Noble did not. Brahler's first failure to appear for a scheduled shift is marked by "such differentiating or mitigating circumstances" that would clearly distinguish Brahler's conduct from Noble's and would explain Brinker's differing treatment of the employees under these differing and relevant circumstances. *See Mitchell*, 964 F.2d at 583.

As for the second instance, Brahler failed to appear for work after he gave the restaurant one week's notice that he was leaving to take another job. Ficorilli testified that "Mr. Brahler did not show for his shift. We did not see [him again] after he did not show . . . . So he would have been terminated." Although Ficorilli testified that Brahler was terminated for his failure to appear during this week, the trial judge pressed to determine whether Ficorilli had *personally* terminated Brahler. The trial judge established through questioning that Ficorilli neither called Brahler to tell him that he was fired, nor did he write him a letter to this effect, nor did he "communicate in any way with Mr. Brahler [to] tell

him that he was fired." Nevertheless, Ficorilli testified, in response to the judge's line of questions, that if Brahler had attempted to return to work after these missed shifts, Ficorilli "would [not] have allowed him to [do so]." The trial judge accorded great significance to the fact that Ficorilli did not personally contact Brahler to inform him of his termination, and the trial judge denied the defendant's in-court motion for judgment as a matter of law accordingly. Similarly, Noble places great emphasis on this fact, claiming that Ficorilli's failure to take affirmative action to communicate the fact of termination to Brahler establishes that "Brahler was not terminated" for similar wrongdoing.

Noble argues that he established relevant similarity because the fact of termination was communicated to him after he allegedly missed a shift, while the fact of termination was not communicated to Brahler, a white server, under like conditions. Noble's argument is unpersuasive because it overlooks the significantly differing circumstances that distinguish Brahler's case from Noble's. Noble makes much of the fact that Ficorilli did not call or write Brahler to let him know he was not free to return to work, but Noble presented no evidence that Ficorilli called or wrote him to communicate a similar fact. Instead, the only evidence regarding any communication of any discharge decision was the evidence showing that Noble was informed *at the restaurant*, when he *attempted to return to work* after allegedly missing a shift, that he had been terminated. Noble presented no evidence showing that Brahler was permitted to return to work after missing his shift(s), that Brahler attempted to return to work after missing his shift(s), or that Brahler would have been permitted to return after missing his shift(s). In fact, the only evidence introduced on this point was that Brahler would not have been permitted to return to work had he tried. The fact that Ficorilli did not go out of his way to inform Brahler, who

had already given his notice, that he would not be permitted to return to work in the few short days he may have had left hardly establishes relevant similarity when Noble has presented *no evidence* that Ficorilli took similar extraordinary measures with respect to the plaintiff. We cannot fault a manager for failing to take unusual, pointless, and arguably vindictive measures against an employee who had clearly manifested his intention to terminate his employment. Surely managers in America's bustling restaurants and diners have more pressing matters at hand than tracking down employees who have already resigned for the visceral satisfaction of uttering the expression: "You're fired!" Nor can we hold that the relevant circumstances surrounding Brahler's termination for failing to appear for his shift(s) are "nearly identical" to those surrounding Noble's termination for allegedly failing to appear for a shift. *See Ercegovich*, 154 F.3d at 352. In fact, they are not even close. We conclude that Noble failed to present evidence showing that Brahler was a similarly situated white employee who was treated more favorably than he.

Second, Noble points to "an employee named 'Will' who [allegedly] did not show up for his shifts in over a week." Noble claims that "Will" too was a "similarly situated" employee who was not terminated. He bases his argument upon the following notation in a manager's book: "Will is no longer working for us. He has not showed [sic] for a shift in over a week." Noble failed to produce any other evidence about "Will" that would permit a rational factfinder to conclude that "Will" was a similarly situated employee outside the protected class who was treated more favorably than was the plaintiff. Noble produced no evidence as to "Will's" position, whether "Will" was outside the protected class, whether "Will" attempted to return to work after his or her missed shift(s), or any other facts that might have shown that "Will" was a similarly situated employee. In fact, the

only evidence introduced about "Will" was that he or she simply stopped coming to work. Noble utterly failed to show that "Will" was a similarly situated employee outside the protected class or that he or she was treated more favorably than was Noble.

Finally, Noble's invocation of the testimony of an assistant manager "that in his experience an employee would not be terminated for a first offense violation of the 'no call/no show' policy" is of no avail. It is the plaintiff's burden to establish that a similarly situated person outside the protected class was treated more favorably than he. *See Mitchell*, 964 F.2d at 583. Noble had the benefit of full discovery, but at trial he was unable to produce a single person who fit this description. Generalized allegations unsupported by evidence are insufficient to meet the plaintiff's burden. Noble simply failed to present any evidence of a similarly situated individual outside the protected class who was treated more favorably than he.

Our conclusion that Noble failed to produce evidence at trial to support a *prima facie* case of discrimination is significant because it takes Noble outside the scope of the rule applied in *Reeves*. As noted above, that case held that evidence supporting a plaintiff's prima facie case, together with sufficient evidence to permit the jury to conclude "that the employer's asserted justification is false," may permit a factfinder to find for the plaintiff. *Reeves*, 530 U.S. at 148. That holding is inapplicable to the facts of this case because Noble failed to present evidence to support a *prima facie* case. Furthermore, even if we were to assume the existence of a *prima facie* case within the meaning of *Reeves*, that case would not mandate affirmance as Noble contends. The *Reeves* Court was careful to make clear that there is no magic formula that will always guarantee victory to a party in an

employment discrimination case. Instead, a discrimination case is subject to Rule 50 review in the same manner as any other case. *Id.* at 148. The Court clearly stated that "a plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false" will not "*always* be adequate to sustain a jury's finding of liability. Certainly there will be instances where, although the plaintiff has established a prima facie case and set forth sufficient evidence to reject the defendant's explanation, no rational factfinder could conclude that the action was discriminatory." *Id.* at 148; *see also Hedrick v. W. Reserve Care Sys.*, 355 F.3d 444, 461 (6th Cir. 2004), *petition for cert. filed*, (U.S. May 27, 2004). Based on the above review of the evidence, we conclude that this is such a case.

The district court should have granted the defendant's motion for judgment as a matter of law, not because Noble failed to make out a *prima facie* case, an issue we do not decide, but because he failed to produce sufficient evidence to support an inference of intentional race discrimination. Let there be no mistake: Noble's problem is not that he failed to make a showing sufficient to get to trial. *Aikens* and *Avery* teach that this determination was for the district court, and we are not to revisit it on appeal. Instead, our focus is on "the ultimate question of discrimination," and Noble's problem is that he failed to prove his case at trial. Noble bore the burden of proving "*both* that the [defendant's proffered] reason was false, *and* that discrimination was the real reason" for the adverse employment action. *Hicks*, 509 U.S. at 515 (emphasis in original). Noble simply failed to produce sufficient evidence from which a rational jury could conclude that racial discrimination was the real reason for his termination.

IV.

"Although we are always hesitant to overturn a jury verdict," *Gray*, 263 F.3d at 602, we hold that the district court erred as a matter of law in denying Brinker's motion for judgment as a matter of law. The evidence in the record is insufficient to permit a rational jury, even if it chose to disbelieve the defendant's proffered reason for discharging Noble, to conclude that the true reason for the discharge was racial discrimination. Accordingly, the judgment of the district court is **REVERSED**.

DISSENT

CLAY, Circuit Judge, dissenting. The majority acknowledges that the jury reasonably could have found that Plaintiff Marcus Noble's former restaurant manager, Linda Lawrence, discriminated against him because of his race. The majority further acknowledges that Noble submitted evidence showing that Noble's complaints about Lawrence's discriminatory treatment were conveyed to manager Anthony Ficorilli at the time Ficorilli decided to terminate Noble for purportedly failing to show up for a shift on April 17, 1999. The majority further acknowledges that the jury reasonably could have found that Ficorilli fabricated his reason for terminating Noble because Noble never agreed to work the April 17, 1999 shift. Nevertheless, the majority holds that no reasonable jury could have found that Ficorilli acted upon Lawrence's racial animus when he terminated Noble for a contrived reason. Instead, the majority substitutes its own inferences from the facts to eviscerate the jury's verdict for Noble. Because the majority has usurped the jury's role as the ultimate finder of fact, I respectfully dissent.

I.

Facts

Noble, an African-American, worked as a server at the Romano's Macaroni Grill in Worthington, Ohio from June, 1998, until his termination on April 18, 1999. Defendant Brinker International, Inc. operates Macaroni Grill restaurants. Noble initially reported to general manager Linda Lawrence and Jeanne Osborne, the service manager. Osborne left the Macaroni Grill in the fall of 1998, and thereafter Tim Wiseman became the service manager. In January, 1999, general manager Lawrence transferred to a Macaroni Grill restaurant in Maine.

At trial, Noble submitted evidence that, prior to Lawrence's departure in early 1999, she subjected him to numerous acts of racial discrimination, including the following: (1) before Noble could begin serving and earning tips, Lawrence, on at least eight occasions, forced him (as well as another unnamed black employee) to repeat an hour-and-twenty-minute oral examination about the restaurant's menu because Lawrence kept failing him (Noble passed the oral exam when he arranged for Osborne to administer the exam, which took about 15 to 20 minutes); (2) Lawrence prevented the hostesses from seating guests at Noble's tables purportedly because he was not providing adequate service; (3) Lawrence "harassed" Noble about not providing his correct social security number on his employment application and for failing to indicate that he was working at a Chili's, another Brinker-operated restaurant (Noble previously had advised an assistant manager of his employment at Chili's and claimed that the incorrect social security number, which was off by one digit, was an inadvertent mistake); and (4) Lawrence suspended Noble for two weeks after she gave him

three separate disciplinary write-ups on a single night for incidents that allegedly were precipitated by customer complaints about his service.

In addition, a former restaurant employee testified that she had heard Lawrence and two chefs laughing about black people and stating that black people "might not know much." A former dishwasher who had worked under Lawrence testified that Lawrence made him shovel the snow and sweep the sidewalk, limited the areas in which he could take a smoke break, limited his ability to switch shifts, denied him free lunches, and denied him overtime pay, whereas white employees were not denied free lunches and were not limited as to where they could smoke. As noted by the majority, "Noble presented a great deal of evidence at trial which, when viewed in the light most favorable to the plaintiff, tended to show that Linda Lawrence may have harbored racial animosity toward Noble and other black employees at the restaurant." *Maj. Op.* at 5 (emphasis omitted).

After Lawrence moved to Maine in January, 1999, Anthony Ficorilli became the general manager of the Worthington Macaroni Grill. Ficorilli and Lawrence met once after Ficorilli started working as the general manager, but they claim that they did not discuss Noble.

According to Ficorilli, on either April 15 or 16, 1999, Noble agreed to work a shift on April 17, but Noble did not show for the shift, nor did he call in to provide an excuse for not showing up. On April 18, 1999, Ficorilli instructed the assistant manager to terminate Noble, pursuant to the restaurant's policy that an employee who violates the "no call/no show policy" can be terminated. Noble, however, denies ever agreeing to work the April 17, 1999 shift. He claims that, on April 16, 1999, he had provided a written

medical excuse to be off work from April 14 to 19, 1999. He further claims that he gave a note from his physician to the service manager, Tim Wiseman, and Wiseman testified that he recalled receiving a medical excuse from Noble prior to April 17, 1999. Consistent with this testimony, there is no document demonstrating that Noble agreed to pick up the April 17, 1999 shift, despite other testimony concerning the restaurant's three separate systems - the manager's "Red Book," a "shift pickup book," and a computerized schedule - for documenting changes or additions to shifts. Further, former service manager Jeanne Osborne testified that it would not be appropriate to terminate an employee who had violated the no call/no show policy without some form of documentation that the employee had agreed to work the shift, such as a notation in the manager's Red Book.

II.

Analysis

On review of a Rule 50 motion for judgment as a matter of law we are required to consider all the evidence in the record, including those facts that are in dispute, in the light most favorable to the nonmoving party (here, Noble), giving him the benefit of all reasonable inferences. *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150, 120 S. Ct. 2097, 147 L. Ed. 2d 105 (2000). Based on the above-described facts, a reasonable jury was permitted to infer that Noble did not in fact violate the no call/no show policy as Ficorilli claims. Indeed, the majority acknowledges this point. *Maj. Op.* at 7.

The jury reasonably could have inferred that Noble never agreed to cover the April 17, 1999 shift based on (a) Noble's testimony that he had provided service manager Wiseman

with a medical excuse to be off work from April 14 to 19, 1999; (b) Wiseman's testimony that he recalled receiving a medical excuse from Noble prior to April 17, 1999; and (c) the absence of any documentary evidence that Noble had agreed to work on April 17, 1999, even though the restaurant had three separate systems for recording shift changes and even though Noble's former service manager testified that it would be inappropriate to terminate an employee under the no call/no show policy without documentation. Because the jury was permitted to infer that Noble did not in fact violate the no call/no show policy, it further could have reasonably inferred that Ficorilli's articulated reason for terminating Noble (violating the policy) was a lie or a pretext to cover-up some other reason. The central question is whether the evidence of Ficorilli's mendacity, combined with any other evidence in the record, permitted the jury to find that Ficorilli's reason was a pretext for race discrimination.

In *Reeves, supra*, the Supreme Court discussed the application of Rule 50 to employment discrimination cases and held that "a plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated." *Reeves*, 530 U.S. at 148. The Court announced this rule because, in general, "once the employer's justification has been eliminated, discrimination may well be the most likely alternative explanation, especially since the employer is in the best position to put forth the actual reason for its decision." *Id.* at 148; *see also id.* at 154 (Ginsburg, J., concurring) ("Under this commonsense principle, evidence suggesting that a defendant accused of illegal discrimination has chosen to give a false explanation for its actions gives rise to a rational inference that the defendant could be masking its actual, illegal motivation."); *id.* at 154-55 (noting that it would be

"atypical" to grant judgment as a matter of law where the plaintiff has submitted evidence establishing a *prima facie* case and that the employer's proffered explanation for its action was false).

The *Reeves* decision teaches us that the district court correctly denied Brinker's motion for judgment as a matter of law so long as Noble submitted evidence to the jury that was sufficient to demonstrate his *prima facie* case and that Ficorilli's proffered explanation for terminating him was false. Noble was fired, so the elements of his *prima facie* case were: (1) he is a member of a protected class, (2) he was qualified for his job and did it satisfactorily, (3) despite his qualifications and performance, he suffered an adverse employment action, and (4) he was replaced by a person outside the protected class or was treated less favorably than a similarly situated individual outside his protected class. *Cicero v. Borg-Warner Automotive, Inc.*, 280 F.3d 579, 583 (6th Cir. 2002) (citing *McDonnell Douglas v. Green*, 411 U.S. 792, 802, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973); *Johnson v. Univ. of Cincinnati*, 215 F.3d 561, 572-73 (6th Cir. 2000); *Mitchell v. Toledo Hosp.*, 964 F.2d 577, 582 (6th Cir.1992)). It is undisputed that Noble submitted sufficient evidence to prove the first three elements of his *prima facie* case. Thus, the question is whether Noble submitted evidence establishing that he was replaced by a non-black employee or was treated less favorably than a similarly situated non-black employee.

Noble has neither argued nor pointed to any evidence that he was replaced by a non-black employee after his termination. Instead, Noble argues that, whereas Brinker immediately terminated him for failing to show up for a shift on April 17, 1999 and failing to call to say that he would miss the shift, a similarly-situated white server, Michael Brahler,

was not terminated under similar circumstances. Like Noble, Brahler worked for Anthony Ficorilli, the general manager of the restaurant who claims that he strictly enforces the no call/no show policy. Noble argues that Brahler violated the no call/no show policy by failing to appear for any of his shifts over a one week period, but was not terminated until after he had missed a full week of shifts.

The record is unclear regarding whether Ficorilli waited to terminate Brahler until he committed several violations of the no call/no show policy compared to Ficorilli's termination of Noble after a single violation. Other evidence suggests that Ficorilli did not rigorously enforce a zero tolerance approach.[1] In any event, the real issue is whether Ficorilli should have applied the no call/no show policy to Noble in the first place. As discussed above, the jury reasonably could have found that Ficorilli's assertion that Noble had violated the policy was a lie. It follows that the jury reasonably could have found that Ficorilli's purported "equal" treatment of Noble and Brahler - i.e., not permitting either employee to return to work after violating the no call/no show policy - was not equal at all because Noble never should have been subjected to that policy; he never violated it. Ficorilli fabricated the very premise that ostensibly justified his application of the no call/no show policy to Noble.

A proper comparison between Ficorilli's treatment of Noble and Brahler demonstrates that he did not treat them

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[1] Noble cites to a July, 1999 notation in Ficorilli's manager's notebook stating, "Will is no longer working for us, He has not showed for a shift in over a week." This evidence tends to show that Ficorilli did not immediately terminate employees who violated the "no call/no show rule," undermining Ficorilli's assertion that he rigorously and consistently enforced the no call/no show policy.

equally. Whereas Ficorilli terminated Brahler for violating the no call/no show policy after Brahler actually violated that policy, Ficorilli terminated Noble for violating the policy even though Ficorilli knew (or so the jury could have found) that Noble had not violated it. This is the quintessence of disparate treatment and certainly was sufficient to demonstrate the fourth element of Noble's minimal burden to produce evidence demonstrating his *prima facie* case. See *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 253, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981) ("The burden of establishing a prima facie case of disparate treatment is not onerous."). Because Noble submitted evidence sufficient to demonstrate all elements of his *prima facie* case, as well as sufficient evidence to find that Ficorilli's asserted justification for his termination is false, the jury was permitted to conclude that Brinker unlawfully discriminated against him because of his race. *Reeves*, 530 U.S. at 147. The majority's decision to the contrary is flatly wrong.

Moreover, Noble presented other circumstantial evidence that raised an inference of discrimination and, therefore, was sufficient to satisfy the fourth element of his *prima facie* case. *See McDonnell Douglas*, 411 U.S. at 802 n.13 ("The facts necessarily will vary in Title VII cases, and the specification ... of the prima facie proof required from respondent is not necessarily applicable in every respect to differing factual situations."); *Lyons v. England*, 307 F.3d 1092, 1114 (9th Cir. 2002) ("For the purpose of establishing a *prima facie* case, the plaintiff is not restricted to providing the bare minimum of evidence required by the *McDonnell Douglas* test, but may rely also on other circumstantial evidence that tends to raise an inference of discrimination.") (citing *McDonnell Douglas, supra*). That same evidence also was sufficient for the jury to find that Noble was terminated because of his race. Specifically, Noble presented evidence

directly linking his former manager Lawrence's racial animus to Ficorilli's decision to discharge him.

Service manager Wiseman, who worked for both Lawrence and Ficorilli, testified that Noble told him that Lawrence had been discriminating against him because of his race and that he intended to file suit. Wiseman further testified that he passed Noble's comments on to Lawrence before she transferred to another restaurant. Wiseman also testified that, "at the time that [Noble] had missed a shift," Wiseman told Ficorilli that Noble had "threatened to go to both the NAACP and the labor board and report racial discrimination or accuse [them] of racial discrimination." In other words, contemporaneous with Noble's alleged no call/no show on April 17, 1999, Ficorilli was apprised that Noble had complained about race discrimination by his former manager and that he was prepared to take legal action. The very next day, Ficorilli terminated Noble.[2]

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[2] There was also evidence suggesting that Ficorilli may have known of Noble's concerns about race discrimination months earlier. Although Ficorilli and Lawrence claim that they never discussed Noble on the one occasion when the two managers met, it was for the jury to determine the veracity of this claim, particularly because both Ficorilli's and Lawrence's credibility was undermined at trial. Based on the totality of the evidence, it would have been reasonable to infer that Lawrence, who harbored racial animus toward Noble, informed Ficorilli of Noble's prior complaints of race discrimination in order to negatively impact Noble's employment under Ficorilli. *Cf. Dey v. Colt Const. & Dev. Co.*, 28 F.3d 1446, 1458-59 (7th Cir. 1994)(holding that the court must assume on summary judgment that the non-decisionmaker/harasser relayed the plaintiff's complaints about sexual harassment to the decision-maker, even though both the harasser and the decisionmaker denied this fact; the harasser was present at the meeting in which it was

As noted above and by the majority, there was ample evidence from which the jury reasonably could have inferred that Ficorilli did not fire Noble for his purported violation of the no call/no show policy. Therefore, if Ficorilli was not motivated by Noble's alleged no call/no show, the jury reasonably could have inferred that the true motivating factor for the termination was the new information Wiseman had presented to Ficorilli only a day before the termination, namely, that Noble believed that Lawrence had discriminated against him because of his race. But for Lawrence's racial animus toward Noble, (a) Noble would not have informed Wiseman of Lawrence's discriminatory acts, (b) Wiseman would not have informed Ficorilli on or about April 17, 1999 that Noble believed that Lawrence had discriminated against him and might take legal action, and (c) Ficorilli would not have been motivated to fabricate Noble's purported violation of the no call/no show policy to avoid a potential lawsuit. In this way, there was a direct causal nexus between Lawrence's racially discriminatory actions against Noble and Ficorilli's decision to terminate him.

An employer is not entitled to judgment as a matter of law if the plaintiff has submitted evidence that a non-decisionmaker's discriminatory motives "somehow influenced" or "affected" the decision-maker. *Wilson v. Stroh Cos., Inc.*, 952 F.2d 942, 946 (6th Cir. 1992) (affirming summary judgment for employer because the plaintiff failed to submit evidence that his supervisor's racial animus had somehow influenced or affected the decision of

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decided that plaintiff would be terminated, he had an incentive to pass on this information, and his credibility was in question as to other matters).

two other managers to terminate him; the managers' decision was based on an independent investigation of the plaintiff's conduct); *see also Dey, supra*, 28 F.3d at 1459 ("Summary judgment generally is improper where the plaintiff can show that an employee with discriminatory animus provided factual information or other input that may have affected the adverse employment action.") (citations omitted); *Shager v. Upjohn Co.*, 913 F.2d 398, 405 (7th Cir. 1990) (holding that summary judgment was improper even though the committee that formally terminated the plaintiff harbored no discriminatory animus; the plaintiff's manager, who harbored animus, had tainted the committee's decision by characterizing the plaintiff as a poor performer, thereby rendering the committee a "conduit" of his prejudice).

There is no question that there was sufficient evidence for the jury to conclude that Lawrence's discriminatory animus somehow influenced Ficorilli's termination decision. Because the jury was permitted to reject Ficorilli's fabricated reason as the cause of Noble's termination, it was entitled to infer that the true cause was the discriminatory animus of Noble's former manager of which Ficorilli had just been apprised by Wiseman. Indeed, there appears to be no other explanation for Ficorilli's fabrication.

There is no doubt that legal liability may attach to Brinker as a result of the actions of Lawrence and Ficorilli. The Supreme Court has held that "a tangible employment action taken by the supervisor becomes for Title VII purposes the act of the employer." *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 762, 118 S. Ct. 2257, 141 L. Ed. 2d 633 (1998). Thus, "it would be implausible to interpret agency principles to allow an employer to escape liability" when a supervisor subjects an employee to the tangible employment action of termination. *Id.* at 761, 763. When, as herein, a reasonable

jury could find that a supervisor not only acted as a conduit for a former's supervisor's discriminatory animus, but also knowingly based his termination decision on that animus, the employer is unquestionably subject to vicarious liability. For these reasons, there is absolutely no basis for the majority to hold that Brinker is entitled to judgment as a matter of law.

III.

Conclusion

For all the foregoing reasons, I would affirm the judgment below.

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO,
EASTERN DIVISION

No. C2-00-663

[December 11, 2001, Filed]

Marcus A. Noble,	)
Plaintiff,	)
	)
v.	)
	)
Brinker International, Inc.,	)
Defendant.	)
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ORDER AND OPINION

This matter is before the Court on Defendant's Motion for Summary Judgment filed on July 27, 2001. For the following reasons, the Court **DENIES** Defendant's Motion for Summary Judgment in part and **GRANTS** the Motion in part.

I. INTRODUCTION

This is a race discrimination case brought by Plaintiff Marcus Noble ("Noble") against Defendant Brinker International, Inc. ("Brinker"). Brinker is a holding company

whose subsidiaries operate a number of concept restaurants, including Romano's Macaroni Grill and Chili's, which are located throughout the country.[1] Mr. Noble, an African-American and former employee of Macaroni Grill, claims that he was subjected to disparate treatment in terms and conditions of employment with Brinker in violation of 42 U.S.C. § 1981, Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000 *et seq.* (1991), and the Ohio Revised Code §§ 4112.02 and 4112.99. Noble also alleges that he was terminated in violation of Ohio public policy for filing a lawsuit against another former employer.

II. FACTS

Noble began working as a server at the Macaroni Grill in Worthington, Ohio, on July 9, 1998. At that time, Linda Lawrence ("Lawrence") worked as the restaurant's General Manager. Noble was working at Chili's, another Brinker-operated restaurant, when he applied for a position at Macaroni Grill. Although the employment application asked applicants whether they worked at other Brinker concepts, Noble left this space blank. When he first began his employment with Macaroni Grill, Noble attended an orientation session and received intensive training relating to such items as steps of service and menu knowledge. Noble was also required to pass a written and oral examination before commencing work as a server. While Plaintiff passed the written exam, he had difficulty passing the oral test. Lawrence administered the oral test eight or nine times without satisfaction that Noble was ready to wait tables.

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[1] As Brinker operates Romano's Macaroni Grill, the terms Brinker and Macaroni Grill are used interchangeably.

Finally, Associate Manager Jeannie Osborne ("Osborne") tested Noble and determined that he was prepared to begin work. Plaintiff claims that Lawrence gave him a much more difficult oral exam than she used with white employees. With Noble, she allegedly asked questions from the entire menu in addition to those from a preprinted oral exam sheet.

Shortly after Noble began working, Lawrence discovered that he was also working at Chili's. This concerned Lawrence because Noble's application did not indicate his second employment, and the company could be forced to pay overtime if Noble worked more than 40 hours per week between the two restaurants. Plaintiff claims that Lawrence became infuriated when she learned of his second job and accused him of defrauding Brinker. Noble states that several other white employees were similarly employed, which was not prohibited under company policy unless overtime pay became an issue. Lawrence, Osborne, and Noble discussed the issue, and Plaintiff accused Lawrence of confronting him because of his race.

At that time, Noble also confronted her about various other actions she had taken that he had perceived as racist. Plaintiff, for instance, believed that white coworkers were given better shifts than African-American employees; that African-American servers were denied priority customer opportunities; that African-American workers were kept later than white workers at the end of shifts; and that African-Americans were forced to endure an intimidating, hostile, and offensive work environment. When Noble raised these issues, he states that Lawrence became polite and did not fire him as he feared she would. Soon thereafter, Plaintiff contacted Defendant to complain about Lawrence's behavior.

Lawrence claims that she received three guest complaints relating to Noble on November 25, 1998. First, a guest called and complained that Noble deliberately rushed the table to finish their meals. Second, that same evening, a server summoned Lawrence to a table where the guests complained that they heard Noble using profanity. Both the server and the guests identified Noble as the individual who had used profanity. Third, Lawrence learned that Noble had failed to greet a table within forty-five seconds of the guests being seated, as required by company policy. In this case, the guests waited approximately ten minutes. Noble admitted that this incident occurred and, when confronted by the manager about it, stated that the guests "can wait."

Plaintiff claims that the charge that he rushed guests was simply a reasserted allegation that Lawrence had made two months earlier, after which Osborne defended Noble's conduct. But by November 25, 1998, Osborne had quit and Plaintiff asserts that Lawrence simply fabricated the latter complaint to justify suspending Noble. Plaintiff denies that he ever used profanity near a table. And Plaintiff maintains that, although he did not formally greet them because he was busy tending to a cork he had broken in a wine bottle, he acknowledged the guests who were left waiting, as required by management when servers are extremely busy. He further claims that many white servers were late to their tables but were never disciplined.

Lawrence and Noble discussed these complaints on November 25, 1998, and Lawrence claims that at this meeting Noble did not deny that the first two events had occurred. Plaintiff, however, contends that at the meeting he denied that he had rushed the guests or had used profanity. In accordance with standard practice to issue written warnings for guest complaints, Lawrence issued three written Notices of

Violation to Noble, each of which he signed. Plaintiff states that he originally refused to sign the notice pertaining to making the guests wait, but Lawrence allegedly told him that failure to sign would result in his immediate termination. Plaintiff now maintains that, even if these events did occur, they happened on different nights and not the evening of November 25, 1998, as Lawrence claims. After issuing the three Notices of Violation, Lawrence suspended Noble for two weeks without pay. Plaintiff states that he again contacted Defendant about Lawrence's alleged disparate treatment, but Defendant failed to respond. Plaintiff alleges that Lawrence fabricated the first two complaints so that she could suspend him. He argues that Lawrence knew that another violation would result in termination, and that his suspension would set the stage for his discharge.

In January 1999, Lawrence transferred out of the Worthington Macaroni Grill to a Macaroni Grill in Maine, and Tony Ficorilli ("Ficorilli") transferred in and replaced her as General Manager. On Thursday, April 15, or Friday, April 16, 1999, Ficorilli noticed that he had an evening shift that needed to be covered by a server that Saturday, April 17, 1999. Ficorilli claims that he asked Noble if he would be willing to cover the shift, and Noble agreed to do so. Ficorilli states that he confirmed the arrangement with Noble at least twice during their conversation. Yet, Noble did not show up for work that Saturday and did not call to explain his absence. Ficorilli states that he decided to terminate Noble's employment for not showing up or calling on Saturday, April 17, 1999.

Noble admits that he understood that a failure to call or show for an assigned shift could result in termination. Plaintiff had been sick that week and had obtained a doctor's note attesting to his tonsilitis and excusing him from work between

April 14 and April 19, 1999. But since he was feeling better by Friday, April 16, 1999, Noble went to work because he told Ficorilli that he would be there that day. He then provided the doctor's note to a manager. Plaintiff states that during his Friday night shift, he never agreed to cover a shift on Saturday, April 17, 1999. He also felt better on Sunday and went to work, where he learned from Service Manager John Clark ("Clark") that he was being terminated for a "no-call/no-show" the previous evening.

Plaintiff contends that, generally, agreements between servers to pick up or switch shifts were recorded in the shift pick-up book and signed by the servers and a manager; oral agreements were usually not allowed. If such an agreement involved a manager and a server, it did not have to be recorded in the shift pick-up book, but was generally recorded in the manager's log. When Noble picked up shifts for other managers, they required it to be in writing. The agreement between Ficorilli and Noble, however, was not recorded in writing anywhere. Ficorilli did not put Noble's name on Saturday's work schedule, but maintains that he listed Noble in the "Cruise Control" computer program used by Defendant to create schedules and update rosters. While Ficorilli states that an employee can get his or her job back with a legitimate excuse, Plaintiff was not rehired after he presented the doctor's excuse.

Consequently, Plaintiff filed a Charge of Discrimination with the Equal Employment Opportunity Commission on January 11, 2000, and received a Right to Sue letter on March 22, 2000. Plaintiff's Complaint was filed on June 15, 2000, and contains four counts: Count I alleges racial discrimination under Title VII of the Civil Rights Act of 1964, as amended (1991), 42 U.S.C. §§ 2000 *et seq.*; Count II alleges racial discrimination under the Civil Rights Act of 1866, 42 U.S.C.

§ 1981; Count III alleges racial discrimination under the Ohio Revised Code §§ 4112.02 and 4112.09; and Count IV alleges retaliation and wrongful termination in violation of public policy.

III. STANDARD OF REVIEW

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. " FED. R. CIV. P. 56(c). The movant has the burden of establishing that there are no genuine issues of material fact, which may be accomplished by demonstrating that the nonmoving party lacks evidence to support an essential element of its case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986); *Barnhart v. Pickrel, Schaeffer & Ebeling Co.*, 12 F.3d 1382, 1388-89 (6th Cir. 1993). The nonmoving party must then present "significant probative evidence" to show that "there is [more than] some metaphysical doubt as to the material facts." *Moore v. Philip Morris Cos.*, 8 F.3d 335, 340 (6th Cir. 1993) (citation omitted). "Summary Judgment will not lie if the dispute is about a material fact that is 'genuine,' that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986); *see also Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986) (finding summary judgment appropriate when the evidence could not lead a trier of fact to find for the nonmoving party).

In evaluating a motion for summary judgment, the evidence must be viewed in the light most favorable to the

nonmoving party. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157, 90 S. Ct. 1598, 26 L. Ed. 2d 142 (1970). In responding to a motion for summary judgment, however, the nonmoving party "may not rest upon its mere allegations ... but ... must set forth specific facts showing that there is a genuine issue for trial." FED. R. CIV. P. 56(e); *see also Celotex*, 477 U.S. at 324; *Searcy v. City of Dayton*, 38 F.3d 282, 286 (6th Cir. 1994). Furthermore, the existence of a mere scintilla of evidence in support of the nonmoving party's position will not be sufficient; there must be evidence on which the jury could reasonably find for the nonmoving party. *Anderson*, 477 U.S. at 251; *see also Copeland v. Machulis*, 57 F.3d 476, 479 (6th Cir. 1995).

IV. ANALYSIS

A. Threshold Considerations Regarding Plaintiff's Discrimination Claims

Defendant argues that Plaintiff's Title VII Claims are time-barred and that Noble failed to exhaust his administrative remedies. A plaintiff asserting Title VII Claims must file a charge with the EEOC within 180 days of the alleged unlawful practice or within 300 days where the plaintiff first files with a state or local employment agency. *See* 42 U.S.C. § 2000e-5(e). Since Ohio is a deferral state, only those allegedly discriminatory actions that occurred within the 300 days prior to the filing of the charge are actionable. *Perazzo v. Top Value Enterprises, Inc.*, 590 F. Supp. 428, 432 (S.D. Ohio 1984).

Noble filed his charge with the EEOC on January 11, 2000. As March 17, 1999 is 300 days prior, only those actions occurring on or after March 17, 1999 should be actionable. Based on Noble's testimony, the only action that

occurred after that date was his termination. Defendant claims that Plaintiff has apparently not alleged in his Complaint that his termination was based upon race discrimination. And all other actions, such as the delay in passing the oral examination, Lawrence's alleged instruction to the hostesses not to seat guests in Noble's station, and the two week suspension, occurred prior to January 1999. Therefore, Brinker contends that all of Noble's Title VII claims are time-barred.

Furthermore, Defendant maintains that Noble failed to exhaust his administrative remedies by not cooperating with the EEOC's investigation. Title VII plaintiffs who resort to the administrative process yet fail to cooperate in proceedings can fail to exhaust their administrative remedies. *Barnes v. Levitt*, 118 F.3d 404, 409 (5th Cir. 1997), *cert. denied*, 523 U.S. 1136, 118 S. Ct. 1839, 140 L. Ed. 2d 1090 (1998); *Hill v. Runyon*, 959 F. Supp. 488, 495 (N.D. Ill. 1997) (holding that plaintiff failed to exhaust administrative remedies when he became impatient, demanded that the EEOC cease its investigation, and rushed to the courthouse). In *Barnes*, the plaintiff failed to exhaust her administrative remedies where she, through her counsel, declined to cooperate with the SEC's investigation into her EEOC Complaint and informed the investigator that the SEC would receive information through the discovery process after she filed her complaint in court. *See Barnes*, 118 F.3d at 407. Brinker claims that after Noble filed a discrimination charge with the EEOC, the Commission's investigator originally advised Noble that everything was approved. But shortly thereafter, the EEOC decided it needed more information before issuing a right to sue letter. Noble then wrote to the EEOC investigator, stating:

> This letter is a follow up letter to the letter dated February 7, that told me to disregard your letter dated

> February 2. In a letter dated February 11, I made it clear to the E.E.O.C. that I didn't like, that based on the Respondents request you had the nerves to try to help the respondent out by tring (sic) to find something in a second interview to dismiss the charges . . . so I want my right to sue letter so that I can file my case in Federal Court immediately or before Friday March the 10 . . . .

Brinker claims that this April 17, 2000 letter responded belligerently to the investigator's attempts to investigate the matter, and that it demanded a right to sue letter. Although Plaintiff received a right to sue letter, such an issuance does not necessarily mean that a complainant has exhausted his administrative remedies. *Adair v. Broadlawns Medical Center*, 102 F. Supp. 2d 1092, 1095, n2 (S.D. Iowa 1999); *Dates v. Phelps Dodge Magnet Wire Co.* 604 F. Supp. 22, 27 (N.D. Ind. 1984). Defendant argues that Plaintiff failed to exhaust his administrative remedies, since Noble's actions allegedly undermined the purposes of administrative exhaustion to investigate and conciliate matters and prevent overburdening courts.

As an initial matter, Defendant errs in claiming Plaintiff did not allege race discrimination in his Complaint. Noble's Complaint clearly does so in Count I, PP 34-37. While Defendant correctly points out that his claims are subject to the 300-day window, Plaintiff has produced enough evidence to fall within the exception for a continuing violation. The continuing violation doctrine provides that when "there is an ongoing, continuous series of discrimination acts, they may be challenged in their entirety as long as one of those discriminatory acts falls within the violations period." *Haithcock v. Frank*, 958 F.2d 671, 677 (6th Cir. 1992). When a continuing violation is shown, "a plaintiff is entitled to have

a court consider all relevant actions allegedly taken pursuant to the employer's discriminatory policy or practice, including those that would otherwise be time barred." *Alexander v. Local 496, Laborers' Intern. Union of North America*, 177 F.3d 394, 408 (6th Cir. 1999).

Continuing violations may be shown in one of two ways. The first is "where there is some evidence of *present* discriminatory activity giving rise to a claim of a continuing violation" and "at least one of the forbidden discriminatory acts occurred within the relevant limitations period." *Haithcock*, 958 F.2d at 678 (citation omitted). Plaintiff was terminated on April 18, 1999, and alleges that communications between Lawrence and Ficorilli after the latter became Manager helped lay the groundwork for Noble's firing. Lawrence spoke of "challenges" she encountered at Macaroni Grill, and Plaintiff argues that personnel issues were included in her discussions with Ficorilli. Lawrence's treatment of Noble, by perhaps disciplining him unfairly, may well have laid the foundation for his termination under Ficorilli's supervision. Since Ficorilli fired him after March 17, 1999, and the termination may have been tied to prior discrimination, all discriminatory acts that occurred prior to March 17, 1999, are actionable under the continuing violation doctrine.

Plaintiff can also demonstrate a "longstanding and demonstrable policy of discrimination" to satisfy the continuing violation doctrine. *Id.* To make such a showing, Noble must establish "that some form of intentional discrimination against the class of which plaintiff was a member was the company's 'standing operating procedure.'" *EEOC v. Penton Indus. Publ'g Co.*, 851 F.2d 835, 838 (6th Cir. 1988) (citation omitted). Noble alleges that Macaroni Grill discriminated against African-Americans in hiring,

promotion, compensation, and treatment. Another African-American server named Wally, for instance, was hired at the same time as Plaintiff but quit after Lawrence failed him on the oral examination numerous times. Plaintiff claims that Lawrence instructed the hostesses to send guests away from his coverage areas; that Lawrence generally did not hire African-Americans, and those she did hire were either fired or quit; and that Lawrence systematically denied them leadership positions and berated them when they made mistakes, although she did not disparage white servers who made mistakes.

Noble has raised sufficient issues of material fact to suggest that Brinker's alleged discriminatory practices may have been part of a larger pattern and practice of disparate treatment dating back to when he was first hired. Plaintiff's allegations certainly suggest that Brinker may have had a longstanding and over-arching policy of discrimination. *Haithcock*, 958 F.2d at 678. Such disparate treatment could very well have been the "standing operating procedure" of Lawrence. *Pendon Indus. Publ'g Co.*, 851 F.2d at 838. Since Plaintiff has offered evidence that all of these actions may be part of a continuing violation, Noble's claims are not time-barred.

Plaintiff also has not failed to exhaust his administrative remedies. Defendant's argument here is unpersuasive and does not rely on any Sixth Circuit precedent. The Fifth Circuit's *Barnes* ruling is also distinguishable, as that plaintiff "repeatedly refused to answer questions, provide details, make a statement, give a deposition or even sign her complaint." *Barnes*, 118 F.3d at 409. The Fifth Circuit determined that the plaintiff "wholly failed to exhaust her administrative remedies" because of her repeated attempts to thwart the process. *Id.; see also Hill*, 959 F. Supp. at 495

(plaintiff's counsel "repeatedly failed to provide the EEOC with the information it required and requested to conduct an investigation"). In this case, however, Noble cannot be said to have so undermined the EEOC's investigation process, as he essentially cooperated with them while seeking a right to sue letter. Noble's April 17, 2000 letter that Defendant cites simply does not rise to the same level of uncooperative behavior seen in *Barnes* and *Hill*. Therefore, the Court finds that Plaintiff's discrimination claims are not time-barred and that he did not fail to exhaust his administrative remedies before filing suit.

B. Plaintiff's Title VII Discrimination Claims

Defendant argues that Plaintiff has failed to state a *prima facie* claim of race discrimination under Title VII, which provides in pertinent part:

> It shall be an unlawful employment practice for an employer –
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> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin;

42 U.S.C. § 2000e(2)(a)(1). Ohio Revised Code § 4112 is the state law equivalent of Title VII. The Ohio courts have held that the evidentiary standards and burdens of proof applicable to a claimed violation of Title VII of the Civil Rights Act of 1964 are likewise applicable in determining whether a violation of Ohio Rev. Code § 4112 has occurred. Thus, the federal case law governing Title VII actions is generally

applicable to cases involving alleged violations of § 4112. *Williams v. Ford Motor Co.* 187 F.3d 533, 538 (6th Cir. 1999) (citations omitted).

1. *Prima Facie* Case of Discrimination

It is well settled that, without direct evidence of discrimination, a Title VII plaintiff must first establish, by a preponderance of the evidence, a *prima facie* case of racial discrimination. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973). To establish a *prima facie* case, the plaintiff must show: (1) that he was a member of a protected class; (2) that he suffered an adverse employment action; (3) that he was qualified for the position; and (4) that he was replaced by a person outside the class. *Id.* The plaintiff can also make out a *prima facie* case by showing, in addition to the first three elements, that "a comparable non-protected person was treated better." Id.

With respect to the second element of the *prima facie* case, the adverse employment action must be "materially adverse" in order for the plaintiff to succeed on a Title VII claim. *See Hollins v. Atlantic Co.*, 188 F.3d 652, 662 (6th Cir. 1999) (citing *Kocsis v. Multi-Care Management, Inc.*, 97 F.3d 876, 886 (6th Cir. 1996) to apply the "materially adverse" requirement of the ADA to a Title VII claim). Adverse employment actions include: "termination of employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices that might be unique to a particular situation." *Kocsis*, 97 F.3d at 886 (citation omitted). They do not include: "mere inconvenience" or "an alteration of job responsibilities." *Hollins*, 188 F.3d at 662. Although not reaching the question directly, the Sixth Circuit has noted in *dicta* that "[a] fifteen-

day suspension probably does not qualify as an adverse employment action either." *Birone v. Indian River Sch.*, 1998 U.S. App. LEXIS 7603, No. 97-3212, 1998 WL 199791, at *4 (6th Cir. Apr. 15, 1998).

As for the third element of a *prima facie* case, in ascertaining whether the plaintiff was qualified for the position, the court must look to the plaintiff's qualifications before his allegedly unacceptable performance began. *Cline v. Catholic Diocese of Toledo*, 206 F.3d 651, 661 (6th Cir. 1999) (finding that "it is [] inappropriate for the district court in the pre-trial stage to rely on the nondiscriminatory reason for termination to find plaintiff's prima facie case inadequate").

Under the fourth element, early jurisprudence suggested that the exemplar comparable employee must be "similarly-situated *in all respects.*" *Mitchell v. Toledo Hosp.*, 964 F.2d 577, 583 (6th Cir. 1992) (citing *Stotts v. Memphis Fire Dep't*, 858 F.2d 289 (6th Cir. 1988)). In *Pierce v. Commonwealth Life Insurance Co.*, 40 F.3d 796 (6th Cir. 1994), the Sixth Circuit elaborated on this standard:

> In order for two or more employees to be considered similarly-situated for the purpose of creating an inference of disparate treatment in a Title VII case, the plaintiff must prove that all of the relevant aspects of his employment situation are nearly identical to those of the . . . employees whom he alleges were treated more favorably. The similarity between the compared employees must exist in all relevant aspects of their respective employment circumstances.

Id. at 802 (quoting *Ruth v. Children's Med. Ctr.*, 1991 U.S. App. LEXIS 19062, No. 90-4069, 1991 WL 151158, at *6

(6th Cir. Aug. 8, 1991)). The Sixth Circuit advanced the evolution of the similarly-situated criterion in *Perry v. McGinnis*, 209 F.3d 597 (6th Cir. 2000), when it shifted its focus from formalism to functionality by ruling that "in applying the [similarly-situated] standard courts should not demand exact correlation, but should instead seek relevant similarity." *Id.* at 601 (citing *Ercegovich v. Goodyear Tire & Rubber Co.*, 154 F.3d 344, 352 (6th Cir. 1998)). Thus, for another employee to be "comparable" to a plaintiff, he must be similarly-situated in all *relevant* respects.

In the matter *sub judice*, Defendant maintains that none of Plaintiff's allegations establishes a *prima facie* case under Title VII. With regard to the oral examination, Defendant argues that it is undisputed that a server must pass the oral examination before being certified to serve tables at Macaroni Grill. The temporary delay Plaintiff suffered from not passing the test immediately does not, according to Defendant, constitute an adverse employment action. Not every action that makes an employee unhappy or resentful is an adverse employment action. *Primes v. Reno*, 190 F.3d 765, 767 (6th Cir. 1999). Noble was informed that he failed the test because he needed more time to learn the menu and the pronunciation of the names of the dishes. Defendant also claims that Plaintiff is unable to establish that Lawrence passed any similarly-situated white employees who had similar difficulty with the tested topics. According to former Associate Manager Timothy Wiseman, a number of white servers failed the oral examination upon their first attempt.

Brinker also argues that Noble cannot establish a *prima facie* case that he earned less in tips on days that he opened with Lawrence as Manager because she instructed the hostesses not to seat guests in his section. Defendant contends that Plaintiff cannot prove that Lawrence so instructed

hostesses each time she opened the restaurant with Noble, and can only rely on inadmissable hearsay for this proposition. Brinker acknowledges that Lawrence stated in her deposition that she sometimes slowed or stopped the seating of guests into Noble's station during the course of his shift due to his inability to service properly his current tables. But managers have instructed hosts or hostesses to slow the seating of guests to the stations of many servers, including white workers, who were falling behind in servicing their current guests. Defendant maintains that Plaintiff has not identified any similarly-situated white servers who were treated more favorably under the circumstances.

Defendant further argues that Noble cannot establish a *prima facie* case that his two week suspension starting November 25, 1998, was discriminatory, because he cannot show that similarly-situated white coworkers were not suspended under similar circumstances. Brinker asserts that Noble has no evidence for his claim that white servers were late to their tables but not disciplined, and lacks proof that guests complained about those servers. To establish a *prima facie* case on this charge, Defendant believes that Noble must prove that a similarly-situated white server received three written warnings about guest complaints in such a short amount of time yet was not suspended.

The Court finds that Plaintiff has established a *prima facie* case of race discrimination. As an African-American, Noble, of course, satisfies the first prong of the *Mitchell* test. Under the second prong, his termination surely constitutes an adverse employment action. *Kocsis*, 97 F.3d at 886. Defendant is correct in arguing that Plaintiff's delay in passing the oral examination and his two week suspension are not adverse

employment actions.[2] Nonetheless, Plaintiff challenges a pattern of alleged discrimination, not simply his delay in starting or his suspension. The Court may consider Noble's delay in passing the oral examination and his two week suspension as evidence of a pattern and practice of discrimination by Defendant.

Indeed, Noble has presented evidence that he failed the oral test not because he had difficulty with its content, but because Lawrence administered a much more difficult test to him than his white coworkers. Lawrence, for example, may have asked white employees questions from a preprinted form, though she tested African-Americans by asking additional questions straight from the menu. Noble also offers evidence that his two-week suspension on November 25, 1998 was based on Lawrence's discriminatory acts. Plaintiff argues that Lawrence fabricated the complaints against him that led to his three written warnings and suspension, while she did not process such complaints against white workers. Defendant argues that Plaintiff is unable to cite similarly-situated white servers who received three warnings but were not suspended, but that is exactly Plaintiff's point: Brinker maintained two systems of discipline -- one for white workers and another for African-Americans.

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[2] *See Bowman v. Shawnee State Univ.*, 220 F.3d 456, 462 (6th Cir. 2000) ("the very temporary nature of the employment action in this case [ten day removal of plaintiff's responsibilities as coordinator] makes it a non-materially adverse employment action."); *Birone v. Indian River Sch.*, 1998 U.S. App. LEXIS 7603, No. 97-3212, 1998 WL 199791, at *4 (6th Cir. Apr. 15, 1998) (noting in *dicta* that "[a] fifteen-day suspension probably does not qualify as an adverse employment action").

In his deposition, for instance, Plaintiff listed several white employees who were late to greet tables because they were smoking, but were not disciplined by Lawrence. Plaintiff contends that since the work environment was small and Plaintiff knew all of his coworkers, he would have heard about disciplinary action against white servers had Lawrence taken any. In fact, Noble argues that it would be remarkable if a white employee was disciplined and Plaintiff did not know about the disciplinary action taken. In each instance, white employees escaped discipline, though he did not. The Court finds that this pattern of disparate treatment will obviously result in African-Americans accumulating more warning letters and other discipline than their white colleagues for the same conduct. A vicious cycle, then, is created -- the white workers will never receive three warning letters leading to suspension because they are always excused, while African-Americans are not. Still, even if Plaintiff's arguments as to his oral examination and suspension fail, based on his termination alone, Noble has met the second element of the *prima facie* test.

Plaintiff satisfies the third prong, as he was qualified for the position of server before his allegedly unacceptable conduct began. He had long worked in the restaurant industry, including at another Brinker-operated establishment; he easily passed the written test to begin as a server at Macaroni Gill; and Noble eventually passed the oral test -- on his first try when administered by Osborne and based on the same preprinted form used to question white workers.

Plaintiff also meets the fourth standard as elaborated in *Perry v. McGinnis*. He has raised several issues of material fact relating to similarly-situated white coworkers who received no disciplinary action when greeting tables late, who

were given easier oral exams, and who were given priority in customer seating. Plaintiff contends that he was not given as many customers as his white colleagues when he opened the restaurant with Lawrence. On many occasions, Plaintiff would be forced to stand around because he did not have any guests seated at his station, or significantly fewer guests than white servers. He claims that it was a joke among the servers that Lawrence would not seat guests in his station. White servers would even give Plaintiff tables to wait on to help him earn tips when Lawrence worked. The Court may consider all of this in the context of Plaintiff's claim that Defendant engaged in a pattern and practice of discrimination by treating similarly-situated white coworkers more favorably than him.

And, most importantly for the purposes of examining the fourth element of Plaintiff's *prima facie* case, the Court finds that Noble has met his burden under *Mitchell* by citing a similarly-situated white employee who was not terminated for being a no-call/no-show, while Plaintiff was fired. Specifically, Plaintiff cites Mike Brahler, a white server, who was a repeated no-call/no-show but was not fired by Defendant. In his deposition, Ficorilli claims that he did terminate Brahler for this behavior. Yet, Assistant Manager Wiseman stated that Ficorilli did not fire Brahler; Wiseman testified in his deposition that Brahler quit. Thus, at the very least, Plaintiff has raised a genuine issue of material fact.

2. Pretext

Once the plaintiff establishes a *prima facie* case under Title VII, the defendant must come forward with a legitimate non-discriminatory reason for the adverse employment action. *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981); *Warfield v. Lebanon Correctional Inst.*, 181 F.3d 723, 729 (6th Cir.

1999). The defendant need not show that the decision was motivated by the proffered reason, only that the non-discriminatory reason is legally sufficient to justify a judgment for the defendant. *Burdine,* 450 U.S. at 254-55; *see also Reeves v. Sanderson Plumbing Prods.*, Inc., 530 U.S. 133, 142, 120 S. Ct. 2097, 147 L. Ed. 2d 105 (2000) (noting that, when proceeding under the *McDonnell Douglas* framework, the defendant's burden to bring forth a legitimate, nondiscriminatory reason for its action "is one of production, not persuasion"). If the defendant proffers a sufficient nondiscriminatory reason, then the presumption created by the *prima facie* case is rebutted. *Reeves*, 530 U.S. at 143; *Burdine,* 450 U.S. at 255. The plaintiff then must demonstrate that the employer's offered reason is but a pretext for unlawful discrimination. *Reeves*, 530 U.S. at 143; *Burdine,* 450 U.S. at 253.

In *Reeves*, the Supreme Court held that "a plaintiff's *prima facie* case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated." *Reeves*, 530 U.S. at 148; *see also Kline v. Tennessee Valley Auth.*, 128 F.3d 337, 343 (6th Cir. 1997) (noting that, "under this method, if the plaintiff establishes that the defendant's reasons are pretextual the trier of fact is permitted, but not required, to enter judgment for the plaintiff").

An employee can show pretext in three different ways. First, the employee may offer evidence that the employer's asserted reason has no basis in fact. *Gray v. Toshiba America Consumer Products, Inc.*, 263 F.3d 595, 600 (6th Cir. 2001); *Manzer v. Diamond Shamrock Chems. Co.*, 29 F.3d 1078, 1084 (6th Cir. 1994). Second, the employee may argue that the reason was insufficient to discipline the employee.

Manzer, 29 F.3d at 1084. Third, the employee may offer evidence that the reason did not actually motivate the employer's decision. In the first two methods, the court may infer discrimination. *Id.*

In the third method, when the plaintiff argues that the defendant's reasons did not actually motivate the adverse employment action, the plaintiff must come forward with additional evidence of discrimination. If the plaintiff does not come forward with additional evidence, "the plaintiff has failed to prove pretext and judgment for the defendant is warranted . . . ." *Kline*, 128 F.3d at 346-47. The third type of case arises "when the plaintiff has failed to introduce evidence that the reasons offered by the defendant are 'factually false.'" *Manzer*, 29 F.3d at 1084.

Assuming that Plaintiff has established a *prima facie* case of discrimination, Defendant claims that Plaintiff cannot prove that Brinker's legitimate nondiscriminatory reasons for these actions were pretextual. First, Brinker asserts that Lawrence did not pass Noble on the oral exam because he needed more time to learn the menu and the pronunciation of the names of the dishes. Despite Noble's contention that he passed the oral test earlier, a plaintiff's assessment of his own qualifications or performance is insufficient as a matter of law to create a genuine issue of material fact with respect to pretext. Furthermore, Defendant argues that Lawrence had good reason to occasionally slow seating in Noble's section to ensure that the current guests would be properly attended. Finally, Brinker claims to have had a legitimate nondiscriminatory reason for suspending Noble for two weeks: he received three written warnings based on guest complaints. His use of profanity, his failure to greet guests within forty-five seconds of their arrival, and his rushing guests all contributed to Lawrence's decision to suspend

Noble for two weeks on November 25, 1998. And Noble's contention that Lawrence was a racist fails to establish pretext. A plaintiff's subjective belief of discrimination is insufficient as a matter of law to defeat summary judgment. *Mitchell*, 964 F.2d 577, 585-86 (6th Cir. 1992) ("rumors, conclusory allegations and subjective beliefs . . . are wholly insufficient evidence to establish a claim of discrimination as a matter of law").

While Defendant has proffered several legitimate nondiscriminatory reasons for these actions, Plaintiff has met the *Reeves* test for demonstrating pretext. First, Noble has shown that Lawrence may well have had no basis in fact for repeatedly failing Noble on the oral examination. He had easily passed the written test and passed the first normal oral exam administered by someone other than Lawrence -- Osborne. Noble's delay in becoming a server could have been pretext for discrimination. Similarly, he has alleged that there was no basis in fact for two of the written warnings leading to his suspension, in that he denies rushing guests or ever using profanity around guests. In arguing that he often stood around without guests while white coworkers were busy, Noble has shown pretext as to Lawrence's justification for slowing and stopping seating of guests in his section. During his tenure, Plaintiff also overheard Lawrence make numerous racial slurs, including: "You people can't think without making mistakes."

Finally, Defendant has offered no evidence that Plaintiff's supposed agreement to cover the Saturday, April 17, 1999 shift was recorded as normal. Plaintiff, in fact, has provided evidence that the agreement to work that night never appeared in the computer generated schedule that was posted on the restaurant's bulletin board. Noble maintains that he never made such an agreement and provided a doctor's note

explaining any such absence that weekend. Nonetheless, Defendant refused to rehire him. Plaintiff has shown that his termination was pretextual, as it either had no basis in fact if there was no agreement, or because Ficorilli's stated reason did not actually motivate him because he otherwise would have given Plaintiff his job back once presented with the doctor's note.

As Plaintiff has established a *prima facie* case of discrimination and demonstrated pretext, the Court **DENIES** Defendant's Motion for Summary Judgment on these issues.

C. Plaintiff's 42 U.S.C. § 1981 Claim

Section 1981 provides:

> (a) All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.
>
> (b) For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

42 U.S.C. § 1981(a)-(b). The elements of a *prima facie* case under § 1981 are the same for those in a Title VII action. *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 113 S. Ct. 2742, 125 L. Ed. 2d 407 (1993); *Jackson v. Quanex Corp.*, 191

F.3d 647 (6th Cir. 1999). Section 1981, however, differs from Title VII in several respects. First, the plaintiff must demonstrate purposeful discrimination in a § 1981 claim. *General Bldg. Contractors Assoc., Inc. v. Pennsylvania*, 458 U.S. 375, 390, 102 S. Ct. 3141, 73 L. Ed. 2d 835 (1982). The burden of demonstrating purposeful discrimination is present throughout the *prima facie* case and, if applicable, in the pretextual analysis. Second, the doctrine of *respondeat superior* does not apply in § 1981 actions. *Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 109 S. Ct. 2702, 105 L. Ed. 2d 598 (1989). Third, in contrast to Title VII, defendants can be held individually liable for discrimination under § 1981. *Jones v. Continental Corp.*, 789 F.2d 1225, 1231 (6th Cir. 1986). To establish individual liability, the individual defendant must have been personally involved in the discriminatory action. *Allen v. Ohio Dept. of Rehabilitation and Correction*, 128 F. Supp. 2d 483, 495 (S.D. Ohio 2001).

Defendant argues that Plaintiff's § 1981 claim fails because purposeful discrimination cannot be proved, and because the doctrine of *respondeat superior* does not apply to actions under § 1981. Defendant contends that Plaintiff has never argued that Brinker engaged in purposeful discrimination against him on the basis of race, but rather that Lawrence discriminated against him in her individual capacity as General Manager.

The Court finds that Plaintiff is able to sue Defendant under § 1981 for these alleged discriminatory acts. Plaintiff alleges that Lawrence, Ficorilli, and other supervising managers have engaged in purposeful discrimination against Plaintiff and other African-American employees of Macaroni Grill. While the doctrine of *respondeat superior* does not apply in this case, Defendant can still be held liable based on common law agency theories. *See, e.g., Alexander v. Local*

496, Laborers' Intern. Union of North America, 177 F.3d 394 (6th Cir. 1999) (common law agency theories of vicarious liability govern the liability of international labor organizations for the acts of their local unions that violate Title VII and § 1981). A principal may be held liable for the intentional torts of its agent if the agent's conduct is within the scope of his or her agency and if, with the knowledge of the conditions, the principal intends the conduct or its consequences. *Id.*

Brinker may be liable for failing to prevent harassment by its employees. Defendant's liability is based on common law agency principles, and an affirmative duty to act to prevent or to stop the harassment. While not strictly liable, Defendant has a duty to act reasonably under the circumstances. Plaintiff argues that Defendant knew that managers at the Worthington, Ohio Macaroni Grill were creating an intimidating and hostile work environment for African-Americans, but failed to take corrective action. Plaintiff notes that Defendant transferred Lawrence to Maine not because she was discriminating, but because she was not meeting financial goals.

Defendant is also liable for the discriminatory acts of Lawrence and Ficorilli because they supervised Noble and had such powers of hiring, firing, and discipline. *See Fitzgerald v. Mountain States Tel. and Tel. Co.*, 68 F.3d 1257, 1263 (10th Cir. 1995) ("an employer is liable under both Title VII and section 1981 where the action complained of was that of a supervisor, authorized to hire, fire, discipline or promote, or at least to participate in or recommend such actions, even though what the supervisor is said to have done violates company policy."). In the case *sub judice*, Noble has provided evidence that his supervising managers, Lawrence and Ficorilli, who Brinker authorized to hire, fire, and discipline employees, intentionally discriminated against Plaintiff.

As Plaintiff's § 1981 claims are not barred as a matter of law, the Court **DENIES** Defendant's Motion for Summary Judgment on this issue.

D. Plaintiff's Claim of Wrongful Discharge in Violation of Public Policy

Plaintiff's last claim is that Defendant wrongfully discharged him in violation of public policy because he was terminated in retaliation for seeking legal advice and filing a lawsuit against a former employer. Brinker contends that Noble's wrongful discharge claim fails as a matter of law. Noble testified in his deposition that his retaliation claim is not based on his seeking legal advice, but rather on a lawsuit he filed against his former employer, Buckeye Hall of Fame Cafe. Plaintiff contends that this claim is based on both his seeking legal advice and filing a lawsuit against his former employer, as was first stated in his Complaint. Noble points out that a clear public policy exists in Ohio discouraging retaliation by employers against their employees who consult attorneys. *See Simonelli v. Anderson Concrete Co.*, 99 Ohio App. 3d 254, 650 N.E.2d 488 (1994).

In order to state a claim of wrongful discharge in violation of public policy, "a plaintiff must allege facts demonstrating that the employer's act of discharging him contravened a 'clear public policy.'" *Painter v. Graley*, 70 Ohio St. 3d 377, 383, 639 N.E.2d 51 (1994). The "clear public policy" can be based on statutes, the Constitutions of Ohio and the United States, administrative rules and regulations, and the common law. *Id.* at 384; *see also Collins v. Rizkana*, 73 Ohio St. 3d 65, 70, 652 N.E.2d 653 (1995) (holding that a cause of action may be brought for wrongful termination in violation of public policy based on sexual harassment and discrimination). In *Kulch v. Structural Fibers, Inc.*, 78 Ohio St. 3d 134, 677

N.E.2d 308 (1997), the Ohio Supreme Court set out the elements necessary to succeed on a claim for wrongful discharge in violation of public policy under Ohio law:

> (1) that [a] clear public policy existed and was manifested in a state or federal constitution, statute or administrative regulation, or in the common law (the clarity element); (2) that dismissing employees under circumstances like those involved in the plaintiff's dismissal would jeopardize the public policy (the jeopardy element); (3) the plaintiff's dismissal was motivated by conduct related to the public policy (the causation element); and (4) the employer lacked overriding legitimate business justification for the dismissal (the overriding justification element).

Id.

The Court finds that Plaintiff has not raised an issue of material fact allowing him to satisfy the *Kulch* test. Noble correctly asserts that the first two factors of the *Kulch* test are questions of law for the Court to decide, although the third and fourth elements are for the trier of fact, and are not appropriate for summary judgment. Yet as Plaintiff fails to satisfy the test's "clarity" and "jeopardy" elements, the Court need not examine the test's third and fourth prongs.

Noble bases this particular cause of action on an alleged violation of Article I Section 16 of the Ohio Constitution, the "Open Courts" provision, which provides in pertinent part: "All courts shall be open, and every person, for an injury done him in his land, goods, person or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay." While Ohio's Open Courts provision discourages retaliation by employers against

employees who consult attorneys, Plaintiff cannot cite any public policy that discourages retaliation against employees who file lawsuits against third-parties. Indeed, discharging an employee for filing a lawsuit against a third-party that affects the business interests of the employer does not violate the Open Courts provision. *See Takach v. American Medical Technology, Inc.*, 128 Ohio App. 3d 457, 715 N.E.2d 577 (1998), *discretionary appeal dismissed*, 85 Ohio St. 3d 1213, 709 N.E.2d 169 (1999). Noble stated in his deposition that he was not aware of Brinker terminating him in retaliation for seeking legal advice as opposed to filing a lawsuit. Plaintiff thus conceded that he can offer no facts to support this claim. Noble's reliance upon the mere allegation in his Complaint relating to this claim fails to defeat summary judgment. Thus, Plaintiff fails to satisfy the first prong of the *Kulch* test. As Plaintiff cites no public policy, none is jeopardized by his termination, and Noble cannot satisfy the second element of the *Kulch* test.

The Court, therefore, **GRANTS** Defendant's Motion for Summary Judgement on this claim.

V. CONCLUSION

For the foregoing reasons, the Court **DENIES** Defendant's Motion for Summary Judgment as to Plaintiff's claims under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C §§ 2000 *et seq.* (1991), the Ohio Revised Code § § 4112.02 and 4112.99, and 42 U.S.C. § 1981. The Court **GRANTS** Defendant's Motion as to Plaintiff's claim of wrongful discharge in violation of Ohio public policy

IT IS SO ORDERED.

ALGENON L. MARBLEY, JUDGE

UNITED STATES DISTRICT COURT

DATED: December 11, 2001

APPENDIX D

STATUTORY PROVISIONS AND RULES

TITLE 42. THE PUBLIC HEALTH AND WELFARE
CHAPTER 21. CIVIL RIGHTS
EQUAL EMPLOYMENT OPPORTUNITIES

42 USC § 2000e

§ 2000e. Definitions

For the purposes of this title [42 USCS §§ 2000e et seq.]--

* * *

(e) A labor organization shall be deemed to be engaged in an industry affecting commerce if (1) it maintains or operates a hiring hall or hiring office which procures employees for an employer or procures for employees opportunities to work for an employer, or (2) the number of its members (or, where it is a labor organization composed of other labor organizations or their representatives, if the aggregate number of the members of such other labor organization) is (A) twenty-five or more during the first year after the date of enactment of the Equal Employment Opportunity Act of 1972 [enacted March 24, 1972], or (B) fifteen or more thereafter, and such labor organization--

(1) is the certified representative of employees under the provisions of the National Labor Relations Act, as amended, or the Railway Labor Act, as amended;

* * *

TITLE 42. THE PUBLIC HEALTH AND WELFARE
CHAPTER 21. CIVIL RIGHTS
GENERALLY
42 USCS § 1981

§ 1981. Equal rights under the law

(a) Statement of equal rights. All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

(b) "Make and enforce contracts" defined. For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

(c) Protection against impairment. The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.

TITLE 41. LABOR AND INDUSTRY
CHAPTER 4112. CIVIL RIGHTS COMMISSION
ORC Ann. 4112.02

§ 4112.02. Unlawful discriminatory practices

It shall be an unlawful discriminatory practice:

(A) For any employer, because of the race, color, religion, sex, national origin, disability, age, or ancestry of any person, to discharge without just cause, to refuse to hire, or otherwise to discriminate against that person with respect to hire, tenure, terms, conditions, or privileges of employment, or any matter directly or indirectly related to employment.

(B) For an employment agency or personnel placement service, because of race, color, religion, sex, national origin, disability, age, or ancestry, to do any of the following:

(1) Refuse or fail to accept, register, classify properly, or refer for employment, or otherwise discriminate against any person;

(2) Comply with a request from an employer for referral of applicants for employment if the request directly or indirectly indicates that the employer fails to comply with the provisions of sections 4112.01 to 4112.07 of the Revised Code.

(C) For any labor organization to do any of the following:

(1) Limit or classify its membership on the basis of race, color, religion, sex, national origin, disability, age, or ancestry;

(2) Discriminate against, limit the employment opportunities of, or otherwise adversely affect the employment status, wages, hours, or employment conditions of any person as an employee because of race, color, religion, sex, national origin, disability, age, or ancestry.

(D) For any employer, labor organization, or joint labor-management committee controlling apprentice training programs to discriminate against any person because of race, color, religion, sex, national origin, disability, or ancestry in admission to, or employment in, any program established to provide apprentice training.

(E) Except where based on a bona fide occupational qualification certified in advance by the commission, for any employer, employment agency, personnel placement service, or labor organization, prior to employment or admission to membership, to do any of the following:

(1) Elicit or attempt to elicit any information concerning the race, color, religion, sex, national origin, disability, age, or ancestry of an applicant for employment or membership;

(2) Make or keep a record of the race, color, religion, sex, national origin, disability, age, or ancestry of any applicant for employment or membership;

(3) Use any form of application for employment, or personnel or membership blank, seeking to elicit information regarding race, color, religion, sex, national origin, disability, age, or ancestry; but an employer holding a contract containing a nondiscrimination clause with the government of the United States, or any

department or agency of that government, may require an employee or applicant for employment to furnish documentary proof of United States citizenship and may retain that proof in the employer's personnel records and may use photographic or fingerprint identification for security purposes;

(4) Print or publish or cause to be printed or published any notice or advertisement relating to employment or membership indicating any preference, limitation, specification, or discrimination, based upon race, color, religion, sex, national origin, disability, age, or ancestry;

(5) Announce or follow a policy of denying or limiting, through a quota system or otherwise, employment or membership opportunities of any group because of the race, color, religion, sex, national origin, disability, age, or ancestry of that group;

(6) Utilize in the recruitment or hiring of persons any employment agency, personnel placement service, training school or center, labor organization, or any other employee-referring source known to discriminate against persons because of their race, color, religion, sex, national origin, disability, age, or ancestry.

(F) For any person seeking employment to publish or cause to be published any advertisement that specifies or in any manner indicates that person's race, color, religion, sex, national origin, disability, age, or ancestry, or expresses a limitation or preference as to the race, color, religion, sex, national origin, disability, age, or ancestry of any prospective employer.

(G) For any proprietor or any employee, keeper, or manager of a place of public accommodation to deny to any person, except for reasons applicable alike to all persons regardless of race, color, religion, sex, national origin, disability, age, or ancestry, the full enjoyment of the accommodations, advantages, facilities, or privileges of the place of public accommodation.

(H) For any person to do any of the following:

(1) Refuse to sell, transfer, assign, rent, lease, sublease, or finance housing accommodations, refuse to negotiate for the sale or rental of housing accommodations, or otherwise deny or make unavailable housing accommodations because of race, color, religion, sex, familial status, ancestry, disability, or national origin;

(2) Represent to any person that housing accommodations are not available for inspection, sale, or rental, when in fact they are available, because of race, color, religion, sex, familial status, ancestry, disability, or national origin;

(3) Discriminate against any person in the making or purchasing of loans or the provision of other financial assistance for the acquisition, construction, rehabilitation, repair, or maintenance of housing accommodations, or any person in the making or purchasing of loans or the provision of other financial assistance that is secured by residential real estate, because of race, color, religion, sex, familial status, ancestry, disability, or national origin or because of the racial composition of the neighborhood in which the housing accommodations are located, provided that the person, whether an individual, corporation, or association of any type, lends money as one of the principal aspects or incident to the person's

principal business and not only as a part of the purchase price of an owner-occupied residence the person is selling nor merely casually or occasionally to a relative or friend;

(4) Discriminate against any person in the terms or conditions of selling, transferring, assigning, renting, leasing, or subleasing any housing accommodations or in furnishing facilities, services, or privileges in connection with the ownership, occupancy, or use of any housing accommodations, including the sale of fire, extended coverage, or homeowners insurance, because of race, color, religion, sex, familial status, ancestry, disability, or national origin or because of the racial composition of the neighborhood in which the housing accommodations are located;

(5) Discriminate against any person in the terms or conditions of any loan of money, whether or not secured by mortgage or otherwise, for the acquisition, construction, rehabilitation, repair, or maintenance of housing accommodations because of race, color, religion, sex, familial status, ancestry, disability, or national origin or because of the racial composition of the neighborhood in which the housing accommodations are located;

(6) Refuse to consider without prejudice the combined income of both husband and wife for the purpose of extending mortgage credit to a married couple or either member of a married couple;

(7) Print, publish, or circulate any statement or advertisement, or make or cause to be made any statement or advertisement, relating to the sale, transfer, assignment, rental, lease, sublease, or acquisition of any housing accommodations, or relating to the loan of

money, whether or not secured by mortgage or otherwise, for the acquisition, construction, rehabilitation, repair, or maintenance of housing accommodations, that indicates any preference, limitation, specification, or discrimination based upon race, color, religion, sex, familial status, ancestry, disability, or national origin, or an intention to make any such preference, limitation, specification, or discrimination;

(8) Except as otherwise provided in division (H)(8) or (17) of this section, make any inquiry, elicit any information, make or keep any record, or use any form of application containing questions or entries concerning race, color, religion, sex, familial status, ancestry, disability, or national origin in connection with the sale or lease of any housing accommodations or the loan of any money, whether or not secured by mortgage or otherwise, for the acquisition, construction, rehabilitation, repair, or maintenance of housing accommodations. Any person may make inquiries, and make and keep records, concerning race, color, religion, sex, familial status, ancestry, disability, or national origin for the purpose of monitoring compliance with this chapter.

(9) Include in any transfer, rental, or lease of housing accommodations any restrictive covenant, or honor or exercise, or attempt to honor or exercise, any restrictive covenant;

(10) Induce or solicit, or attempt to induce or solicit, a housing accommodations listing, sale, or transaction by representing that a change has occurred or may occur with respect to the racial, religious, sexual, familial status, or ethnic composition of the block, neighborhood, or other area in which the housing accommodations are located, or

induce or solicit, or attempt to induce or solicit, a housing accommodations listing, sale, or transaction by representing that the presence or anticipated presence of persons of any race, color, religion, sex, familial status, ancestry, disability, or national origin, in the block, neighborhood, or other area will or may have results including, but not limited to, the following:

(a) The lowering of property values;

(b) A change in the racial, religious, sexual, familial status, or ethnic composition of the block, neighborhood, or other area;

(c) An increase in criminal or antisocial behavior in the block, neighborhood, or other area;

(d) A decline in the quality of the schools serving the block, neighborhood, or other area.

(11) Deny any person access to or membership or participation in any multiple-listing service, real estate brokers' organization, or other service, organization, or facility relating to the business of selling or renting housing accommodations, or discriminate against any person in the terms or conditions of that access, membership, or participation, on account of race, color, religion, sex, familial status, national origin, disability, or ancestry;

(12) Coerce, intimidate, threaten, or interfere with any person in the exercise or enjoyment of, or on account of that person's having exercised or enjoyed or having aided or encouraged any other person in the exercise or

enjoyment of, any right granted or protected by division (H) of this section;

(13) Discourage or attempt to discourage the purchase by a prospective purchaser of housing accommodations, by representing that any block, neighborhood, or other area has undergone or might undergo a change with respect to its religious, racial, sexual, familial status, or ethnic composition;

(14) Refuse to sell, transfer, assign, rent, lease, sublease, or finance, or otherwise deny or withhold, a burial lot from any person because of the race, color, sex, familial status, age, ancestry, disability, or national origin of any prospective owner or user of the lot;

(15) Discriminate in the sale or rental of, or otherwise make unavailable or deny, housing accommodations to any buyer or renter because of a disability of any of the following:

(a) The buyer or renter;

(b) A person residing in or intending to reside in the housing accommodations after they are sold, rented, or made available;

(c) Any individual associated with the person described in division (H)(15)(b) of this section.

(16) Discriminate in the terms, conditions, or privileges of the sale or rental of housing accommodations to any person or in the provision of services or facilities to any person in connection with the housing accommodations because of a disability of any of the following:

(a) That person;

(b) A person residing in or intending to reside in the housing accommodations after they are sold, rented, or made available;

(c) Any individual associated with the person described in division (H)(16)(b) of this section.

(17) Except as otherwise provided in division (H)(17) of this section, make an inquiry to determine whether an applicant for the sale or rental of housing accommodations, a person residing in or intending to reside in the housing accommodations after they are sold, rented, or made available, or any individual associated with that person has a disability, or make an inquiry to determine the nature or severity of a disability of the applicant or such a person or individual. The following inquiries may be made of all applicants for the sale or rental of housing accommodations, regardless of whether they have disabilities:

(a) An inquiry into an applicant's ability to meet the requirements of ownership or tenancy;

(b) An inquiry to determine whether an applicant is qualified for housing accommodations available only to persons with disabilities or persons with a particular type of disability;

(c) An inquiry to determine whether an applicant is qualified for a priority available to persons with disabilities or persons with a particular type of disability;

(d) An inquiry to determine whether an applicant currently uses a controlled substance in violation of section 2925.11 of the Revised Code or a substantively comparable municipal ordinance;

(e) An inquiry to determine whether an applicant at any time has been convicted of or pleaded guilty to any offense, an element of which is the illegal sale, offer to sell, cultivation, manufacture, other production, shipment, transportation, delivery, or other distribution of a controlled substance.

(18) (a) Refuse to permit, at the expense of a person with a disability, reasonable modifications of existing housing accommodations that are occupied or to be occupied by the person with a disability, if the modifications may be necessary to afford the person with a disability full enjoyment of the housing accommodations. This division does not preclude a landlord of housing accommodations that are rented or to be rented to a disabled tenant from conditioning permission for a proposed modification upon the disabled tenant's doing one or more of the following:

(i) Providing a reasonable description of the proposed modification and reasonable assurances that the proposed modification will be made in a workerlike manner and that any required building permits will be obtained prior to the commencement of the proposed modification;

(ii) Agreeing to restore at the end of the tenancy

the interior of the housing accommodations to the condition they were in prior to the proposed modification, but subject to reasonable wear and tear during the period of occupancy, if it is reasonable for the landlord to condition permission for the proposed modification upon the agreement; (iii) Paying into an interest-bearing escrow account that is in the landlord's name, over a reasonable period of time, a reasonable amount of money not to exceed the projected costs at the end of the tenancy of the restoration of the interior of the housing accommodations to the condition they were in prior to the proposed modification, but subject to reasonable wear and tear during the period of occupancy, if the landlord finds the account reasonably necessary to ensure the availability of funds for the restoration work. The interest earned in connection with an escrow account described in this division shall accrue to the benefit of the disabled tenant who makes payments into the account.

(b) A landlord shall not condition permission for a proposed modification upon a disabled tenant's payment of a security deposit that exceeds the customarily required security deposit of all tenants of the particular housing accommodations.

(19) Refuse to make reasonable accommodations in rules, policies, practices, or services when necessary to afford a person with a disability equal opportunity to use and enjoy a dwelling unit, including associated public and common use areas;

(20) Fail to comply with the standards and rules adopted under division (A) of section 3781.111 [3781.11.1] of the Revised Code;

(21) Discriminate against any person in the selling, brokering, or appraising of real property because of race, color, religion, sex, familial status, ancestry, disability, or national origin;

(22) Fail to design and construct covered multifamily dwellings for first occupancy on or after June 30, 1992, in accordance with the following conditions:

(a) The dwellings shall have at least one building entrance on an accessible route, unless it is impractical to do so because of the terrain or unusual characteristics of the site.

(b) With respect to dwellings that have a building entrance on an accessible route, all of the following apply:

(i) The public use areas and common use areas of the dwellings shall be readily accessible to and usable by persons with a disability.

(ii) All the doors designed to allow passage into and within all premises shall be sufficiently wide to allow passage by persons with a disability who are in wheelchairs.

(iii) All premises within covered multifamily dwelling units shall contain an accessible route into and through the dwelling; all light switches, electrical outlets, thermostats, and other environmental controls within such units shall be

in accessible locations; the bathroom walls within such units shall contain reinforcements to allow later installation of grab bars; and the kitchens and bathrooms within such units shall be designed and constructed in a manner that enables an individual in a wheelchair to maneuver about such rooms. For purposes of division (H)(22) of this section, "covered multifamily dwellings" means buildings consisting of four or more units if such buildings have one or more elevators and ground floor units in other buildings consisting of four or more units.

(I) For any person to discriminate in any manner against any other person because that person has opposed any unlawful discriminatory practice defined in this section or because that person has made a charge, testified, assisted, or participated in any manner in any investigation, proceeding, or hearing under sections 4112.01 to 4112.07 of the Revised Code.

(J) For any person to aid, abet, incite, compel, or coerce the doing of any act declared by this section to be an unlawful discriminatory practice, to obstruct or prevent any person from complying with this chapter or any order issued under it, or to attempt directly or indirectly to commit any act declared by this section to be an unlawful discriminatory practice.

(K) (1) Nothing in division (H) of this section shall bar any religious or denominational institution or organization, or any nonprofit charitable or educational organization that is operated, supervised, or controlled by or in connection with a religious organization, from limiting the sale, rental, or occupancy of housing accommodations that it owns or operates for other than a commercial purpose to persons of the same religion, or from giving preference in the sale, rental, or occupancy of such housing accommodations to persons of the

same religion, unless membership in the religion is restricted on account of race, color, or national origin.

(2) Nothing in division (H) of this section shall bar any bona fide private or fraternal organization that, incidental to its primary purpose, owns or operates lodgings for other than a commercial purpose, from limiting the rental or occupancy of the lodgings to its members or from giving preference to its members.

(3) Nothing in division (H) of this section limits the applicability of any reasonable local, state, or federal restrictions regarding the maximum number of occupants permitted to occupy housing accommodations. Nothing in that division prohibits the owners or managers of housing accommodations from implementing reasonable occupancy standards based on the number and size of sleeping areas or bedrooms and the overall size of a dwelling unit, provided that the standards are not implemented to circumvent the purposes of this chapter and are formulated, implemented, and interpreted in a manner consistent with this chapter and any applicable local, state, or federal restrictions regarding the maximum number of occupants permitted to occupy housing accommodations.

(4) Nothing in division (H) of this section requires that housing accommodations be made available to an individual whose tenancy would constitute a direct threat to the health or safety of other individuals or whose tenancy would result in substantial physical damage to the property of others.

(5) Nothing in division (H) of this section pertaining to discrimination on the basis of familial status shall be construed to apply to any of the following:

(a) Housing accommodations provided under any state or federal program that have been determined under the "Fair Housing Amendments Act of 1988," 102 Stat. 1623, 42 U.S.C.A. 3607, as amended, to be specifically designed and operated to assist elderly persons;
(b) Housing accommodations intended for and solely occupied by persons who are sixty-two years of age or older;

(c) Housing accommodations intended and operated for occupancy by at least one person who is fifty-five years of age or older per unit, as determined under the "Fair Housing Amendments Act of 1988," 102 Stat. 1623, 42 U.S.C.A. 3607, as amended.

(L) Nothing in divisions (A) to (E) of this section shall be construed to require a person with a disability to be employed or trained under circumstances that would significantly increase the occupational hazards affecting either the person with a disability, other employees, the general public, or the facilities in which the work is to be performed, or to require the employment or training of a person with a disability in a job that requires the person with a disability routinely to undertake any task, the performance of which is substantially and inherently impaired by the person's disability.

(M) Nothing in divisions (H)(1) to (18) of this section shall be construed to require any person selling or renting property to modify the property in any way or to exercise a higher degree of care for a person with a disability, to relieve any person with a disability of any obligation generally imposed on all persons regardless of disability in a written lease, rental agreement, or contract of purchase or sale, or to forbid distinctions based on the inability to fulfill the terms and

conditions, including financial obligations, of the lease, agreement, or contract.

(N) An aggrieved individual may enforce the individual's rights relative to discrimination on the basis of age as provided for in this section by instituting a civil action, within one hundred eighty days after the alleged unlawful discriminatory practice occurred, in any court with jurisdiction for any legal or equitable relief that will effectuate the individual's rights.

A person who files a civil action under this division is barred, with respect to the practices complained of, from instituting a civil action under section 4112.14 of the Revised Code and from filing a charge with the commission under section 4112.05 of the Revised Code.

(O) With regard to age, it shall not be an unlawful discriminatory practice and it shall not constitute a violation of division (A) of section 4112.14 of the Revised Code for any employer, employment agency, joint labor-management committee controlling apprenticeship training programs, or labor organization to do any of the following:

(1) Establish bona fide employment qualifications reasonably related to the particular business or occupation that may include standards for skill, aptitude, physical capability, intelligence, education, maturation, and experience;

(2) Observe the terms of a bona fide seniority system or any bona fide employee benefit plan, including, but not limited to, a retirement, pension, or insurance plan, that is not a subterfuge to evade the purposes of this section. However, no such employee benefit plan shall excuse the failure to hire any individual, and no such seniority system

or employee benefit plan shall require or permit the involuntary retirement of any individual, because of the individual's age except as provided for in the "Age Discrimination in Employment Act Amendment of 1978," 92 Stat. 189, 29 U.S.C.A. 623, as amended by the "Age Discrimination in Employment Act Amendments of 1986," 100 Stat. 3342, 29 U.S.C.A. 623, as amended.

(3) Retire an employee who has attained sixty-five years of age who, for the two-year period immediately before retirement, is employed in a bona fide executive or a high policymaking position, if the employee is entitled to an immediate nonforfeitable annual retirement benefit from a pension, profit-sharing, savings, or deferred compensation plan, or any combination of those plans, of the employer of the employee, which equals, in the aggregate, at least forty-four thousand dollars, in accordance with the conditions of the "Age Discrimination in Employment Act Amendment of 1978," 92 Stat. 189, 29 U.S.C.A. 631, as amended by the "Age Discrimination in Employment Act Amendments of 1986," 100 Stat. 3342, 29 U.S.C.A. 631, as amended;

(4) Observe the terms of any bona fide apprenticeship program if the program is registered with the Ohio apprenticeship council pursuant to sections 4139.01 to 4139.06 of the Revised Code and is approved by the federal committee on apprenticeship of the United States department of labor.

(P) Nothing in this chapter prohibiting age discrimination and nothing in division (A) of section 4112.14 of the Revised Code shall be construed to prohibit the following:

(1) The designation of uniform age the attainment of

which is necessary for public employees to receive pension or other retirement benefits pursuant to Chapter 145., 742., 3307., 3309., or 5505. of the Revised Code;

(2) The mandatory retirement of uniformed patrol officers of the state highway patrol as provided in section 5505.16 of the Revised Code;

(3) The maximum age requirements for appointment as a patrol officer in the state highway patrol established by section 5503.01 of the Revised Code;

(4) The maximum age requirements established for original appointment to a police department or fire department in sections 124.41 and 124.42 of the Revised Code;

(5) Any maximum age not in conflict with federal law that may be established by a municipal charter, municipal ordinance, or resolution of a board of township trustees for original appointment as a police officer or firefighter;

(6) Any mandatory retirement provision not in conflict with federal law of a municipal charter, municipal ordinance, or resolution of a board of township trustees pertaining to police officers and firefighters;

(7) Until January 1, 1994, the mandatory retirement of any employee who has attained seventy years of age and who is serving under a contract of unlimited tenure, or similar arrangement providing for unlimited tenure, at an institution of higher education as defined

in the "Education Amendments of 1980," 94 Stat. 1503, 20 U.S.C.A. 1141(a).

(Q) (1) (a) Except as provided in division (Q)(1)(b) of this section, for purposes of divisions (A) to (E) of this section, a disability does not include any physiological disorder or condition, mental or psychological disorder, or disease or condition caused by an illegal use of any controlled substance by an employee, applicant, or other person, if an employer, employment agency, personnel placement service, labor organization, or joint labor-management committee acts on the basis of that illegal use.

(b) Division (Q)(1)(a) of this section does not apply to an employee, applicant, or other person who satisfies any of the following:

(i) The employee, applicant, or other person has successfully completed a supervised drug rehabilitation program and no longer is engaging in the illegal use of any controlled substance, or the employee, applicant, or other person otherwise successfully has been rehabilitated and no longer is engaging in that illegal use.

(ii) The employee, applicant, or other person is participating in a supervised drug rehabilitation program and no longer is engaging in the illegal use of any controlled substance.

(iii) The employee, applicant, or other person is erroneously regarded as engaging in the illegal use of any controlled substance, but the employee, applicant, or other person is not engaging in that illegal use.

(2) Divisions (A) to (E) of this section do not prohibit an employer, employment agency, personnel placement service, labor organization, or joint labor-management committee from doing any of the following:

(a) Adopting or administering reasonable policies or procedures, including, but not limited to, testing for the illegal use of any controlled substance, that are designed to ensure that an individual described in division (Q)(1)(b)(i) or (ii) of this section no longer is engaging in the illegal use of any controlled substance;

(b) Prohibiting the illegal use of controlled substances and the use of alcohol at the workplace by all employees;

(c) Requiring that employees not be under the influence of alcohol or not be engaged in the illegal use of any controlled substance at the workplace;

(d) Requiring that employees behave in conformance with the requirements established under "The Drug-Free Workplace Act of 1988," 102 Stat. 4304, 41 U.S.C.A. 701, as amended;

(e) Holding an employee who engages in the illegal use of any controlled substance or who is an alcoholic to the same qualification standards for employment or job performance, and the same behavior, to which the employer, employment agency, personnel placement service, labor organization, or joint labor-management committee holds other employees, even if any unsatisfactory performance or behavior is related to an employee's illegal use of a controlled substance or alcoholism;

(f) Exercising other authority recognized in the

"Americans with Disabilities Act of 1990," 104 Stat. 327, 42 U.S.C.A. 12101, as amended, including, but not limited to, requiring employees to comply with any applicable federal standards.

(3) For purposes of this chapter, a test to determine the illegal use of any controlled substance does not include a medical examination.

(4) Division (Q) of this section does not encourage, prohibit, or authorize, and shall not be construed as encouraging, prohibiting, or authorizing, the conduct of testing for the illegal use of any controlled substance by employees, applicants, or other persons, or the making of employment decisions based on the results of that type of testing.

FEDERAL RULES OF CIVIL PROCEDURE
VI. TRIALS

USC Fed Rules Civ Proc R 50

Rule 50. Judgment as a Matter of Law in Jury Trials; Alternative Motion for New Trial; Conditional Rulings

(a) Judgment as a Matter of Law.

(1) If during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue, the court may determine the issue against that party and may grant a motion for judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue.